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THE FRENCH CONSEIL D'ETAT[1]

GREAT BRITAIN and France, so united in their aspirations, so near to each other in their constitutional and political life, profoundly differ in their administrative organisation.

The Conseil d'Etat, heir of the Conseil du Roi, assists the Government in the direction and control of French administration. It is, at the same time, the supreme tribunal in matters of administrative litigation. There is no comparable institution in Great Britain.

The Conseil d'Etat is the symbol of the centralisation and administrative power which, since the advent of absolute monarchy and especially since the Consulate, have characterised French institutions. England has a common law, to which the state is subject, and which the courts apply according to general and uniform principles. In France, the state and the public services are also subject to the law, but it is a special and autonomous law, which has its own principles, distinct and independent from private law. It is public or administrative law which governs the relations of public administration and individuals, as well as those between the various departments of administration. Whereas, in England, the law is entirely in the hands of the administration of justice, in France there is, between the law and the citizen, a powerful administration which is entirely

[1] A lecture delivered in the University of London, November, 1939. Translated by W. Friedmann.

independent of the organs of justice, that is an autonomous and creative administrative power, which directly executes the law and compels the citizen to respect it. The administration has the right to take decisions, to give orders. These decisions must be obeyed. Administrative decisions have a validity equal to that of judicial decisions. One might even say that, up to a point, they have superior force, since it is the administration which enforces and carries out the decisions of courts of law.

The autonomous power of the administration manifests itself in different ways—

1. Through general regulations. By exercising the power to make rules and regulations, the administration collaborates with the legislature, and it becomes a veritable secondary legislator, entrusted with the completion of the law and with the issue of general, impersonal and obligatory regulations, like the law itself.

2. The administration charges itself with the official enforcement of the law, when the law has not determined its own sanction; this is a matter of mere material enforcement, *manu militari*, recognised as indispensable by administrative jurisprudence, if authority is to remain with the law.

3. The administration finally manifests itself by individual administrative acts, by which it makes the law tangible for every citizen and compels him to carry out the obligations imposed by the law.

To sum up, then, the exercise of administrative power is a direct, swift and, to some extent, discretionary way of assuring the execution of the law, and to compel the obedience of the citizen. It is an essentially French procedure, the origins and causes of which it is worth investigating.

The existence, in France, of a powerful autonomous administration, is due to historical and political reasons.

The kings of France have been compelled, throughout the centuries, to keep together their territories and peoples and to forge them into national unity. They have done that, in a continuous struggle, and in spite of recurrent obstacles put in their way by their continental enemies. This work, carried out in war, demanded swift instruments of command and authority; only an autonomous and centralised administration could supply them; that is why we see it appearing at a very early stage in the history of the monarchy. The situation remained unchanged after the Revolution. First, the necessity for the First Consul to restore the French nation after the disorders of the period from 1790 to 1800, and then, from Napoleon to our own days, the

necessity for France to defend its integrity against too powerful neighbours, has obliged us to maintain a military régime, which is inconceivable without a strong and centralised administration, without an administrative power capable of rapid action and direct command. In general, the danger of war which obliges threatened nations to take military measures, also constrains them to adopt more or less an administrative régime.

We can now understand the place which the Conseil d'Etat occupies among French institutions. The government is the supreme head of the administration. The Conseil d'Etat assists it permanently in its function of directing administration. Further, since government and administration, whatever their power, are always bound to act in conformity with the law, the Conseil d'Etat watches, as the supreme organ of administrative jurisdiction, over the legality of their actions.

A few words about the composition of the Conseil d'Etat. At present the Conseil d'Etat is composed of: forty-two State Councillors on ordinary service, of whom one is the Vice-President and five are Presidents of the sections; forty-three Masters of Request (*Maîtres des Requêtes*); twenty-five Auditors of the First Class; fifteen Auditors of the Second Class. Altogether it has 125 members, whose ages are between twenty-two and seventy-one. The Auditors of the Second Class are appointed by competition; the Auditors of the First Class are chosen from those of the second class; of the Masters three-quarters are chosen from the Auditors of the First Class, and one-quarter from external officials who have held office for at least ten years; of the Councillors two-thirds are chosen from the Masters, and one-third from personalities outside the Conseil who are at least forty years of age.

The Minister of Justice, as Garde des Sceaux, is President of the Conseil. But this is only an honorary function, never exercised in fact. The actual President is the Vice-President.

The ministers have also access to the Conseil, in order to discuss the affairs of their departments. But in practice ministers never participate in the sittings. On the other hand, thirty-one high officials, usually taken from the heads of departments of the ministries, are permanently accredited to the Conseil d'Etat. They are the councillors on extraordinary service. They represent the ministers and deliberate with the members of the Conseil about the matters concerning their respective departments. The Minister of Justice, the other ministers and the councillors on extraordinary service have, however, access only to the administrative sections and to the General Administrative Assembly;

they can never sit in the litigation section. They remain administrators. The law forbids them to be judges, since, by their position, they would be judges in their own cause.

The Conseil d'Etat has five sections, one section for matters of litigation, which forms the Supreme Administrative Tribunal, and four administrative sections, for the Interior, for Finance, for Public Works, for Labour. To each of these sections there corresponds a group of ministries. The General Administrative Assembly, which consists of all the members of the Conseil, meets every week to settle the most important matters, after they have been studied by the sections. The less important matters are handled by the sections alone.

As for the functions of the Conseil d'Etat, they fall under three principal categories, namely legislative, administrative and judicial functions.

Legislative Functions

The law of 24th May, 1872, which still determines the status of the Conseil, intended to make the Conseil collaborate in the legislative work of the Government and of the Houses of Parliament. It says that legislative proposals due to parliamentary initiative may be submitted for advice to the Conseil, either by the Government itself, or by request of Parliament. The authors of the law of 1872 remembered the considerable part which the Conseil d'Etat of Napoleon had played in the preparation of laws during the consular period, and the memorable discussion of the Code Civil under the personal inspiration of the First Consul. They thought that the Conseil of the Third Republic might come to render similar services, less spectacular perhaps, but not less efficient. They thought that the members of legislative assemblies, apt to express general ideas in their proposals, lacked the faculty of clear formulation, and of harmonising the new laws with pre-existing legislation. They meant to reserve the initiative to the Government and Legislature, but the care of legislative technique to the jurists of the Conseil d'Etat.

Their expectations have not been realised. No collaboration has been established between Parliament and Conseil d'Etat in the preparation of statutes. The text of the law has, in this respect, remained a dead letter. I do not know of a single legislative project that has been submitted to the Conseil for examination and advice since 1872. But this should not surprise us. Times have changed since the Consulate. Under the Consulate, the personality of the First Consul dominated the direction of

state affairs. The legislative body voted laws, but without discussion, so much so that it was called "Corps des muets." The preponderance of the Conseil d'Etat in the legislative work was therefore normal; it resulted from the very relations between the various organs of the state. But since 1875 we have lived under a parliamentary régime, a régime characterised by the omnipotence of the Chambers. Parliament, very sensitive, very convinced of its sovereignty, is jealous of its prerogatives. All the more so, it appears, as it becomes more mediocre in its composition. It will not, therefore, under any circumstances, share its legislative attributes with the Conseil d'Etat, if only for the purpose of a simple opinion or technical preparation. And there is no hope of this attitude being modified.

What is more astonishing is that the Government takes the same attitude, when it receives from the Chambers, in extraordinary circumstances, the right to legislate. In such a case, it would appear that the susceptibility of Parliament is out of the question, since it has momentarily abdicated in favour of the Cabinet. Nothing, therefore, seems to prevent the Government from taking the opinions of the Conseil d'Etat on the important texts which it promulgates on its own authority. But it has never done so. Never has a legislative order been submitted to the Conseil d'Etat. To explain this astonishing fact, I hesitate between two possible explanations. It is possible that the Government, imbued with the spirit of Parliament, might be jealous of its momentary prerogative, and anxious not to share it, however feebly, with its natural advisers. On the other hand, legislative orders, as long as they have not been ratified by Parliament, retain, despite their legislative effect, the character of administrative acts. A plea for their annulation, on the ground of illegality, may therefore be submitted to the Conseil d'Etat, and, in fact, some of them have been annulled by the Conseil for excess of power (*excès de pouvoir*). Perhaps it is not desired that the Conseil, as adviser of the Government, should prepare texts, on which it might be ultimately called to decide as supreme judge. Be that as it may, the legislative function of the Conseil has fallen into desuetude. The best minds agree in regretting this fact. Many statutes are made; their draftsmanship leaves much to be desired. The task of interpreters and tribunals becomes more and more arduous. It seems indispensable that recourse should be had, for the drafting of laws, to men whose knowledge and experience are proved. They are at the Conseil d'Etat. But, in view of political habits, there is no prospect for the Conseil to be associated with legislative work.

Administrative Functions

It was the intention of the reorganisers of the Conseil d'Etat, in 1872, that its administrative functions should occupy the first place. These functions, to be sure, are very important; but, as we shall see, their importance has been surpassed by that of the juridical functions.

In the exercise of its administrative functions, the Conseil does not make decisions to be executed. It only gives opinions to the Government. The Government is, by law, often obliged to ask the opinion of the Conseil d'Etat. But it is never obliged to follow it. The opinion of the Conseil has therefore only moral force. It offers a guarantee of serious examination—of good administration. But its juridical efficacy is of the feeblest, since the government can always ignore it.

The matters on which the Conseil is asked to give its opinion are many and varied. They are also of very unequal importance. They include essential matters, such as the control of the departments, municipalities, colonies; as the great concessions of public services (transport, electric energy, mines); but also rather insignificant matters, such as the change of names, the clearing of woods, or the obtaining of water from rivers and canals.

There is no point in enumerating all the cases in which the Conseil d'Etat may be asked to give an opinion. Suffice it to say that the Government, in practice, submits a draft decree to the Conseil, that the Conseil examines it, first by its appropriate Section, then, if sufficiently important, by the General Assembly. After that, the project is sent back to the Government with the advice of the Conseil, of which the Government makes such use as it thinks fit, with full liberty of discretion. There is, however, one essential function of the Conseil in administrative matters to which attention should be specially directed: the consent which it is its task to give or withhold to any decrees of public administration made by the Government.

This necessitates some words of explanation on the power to make regulations (*pouvoir réglementaire*). The Constitution of 1875 has given to the President of the Republic the power of making rules to ensure the execution of the law. The President can therefore, on his own, make such rules as he thinks fit, subject only to the necessity of obtaining the consent of the minister concerned. But in one case the President is not free in his decision: that is where the law expressly prescribes that an executory regulation will have to be made. This regulation takes the name of public administration (*règlement d'administration publique*).

This is a very frequent case. Most statutes, in fact, contain a final clause which says: "A regulation of public administration will determine the conditions under which this statute will be applied."

This clause has two important consequences: The one is that the President of the Republic and the government are bound to make the regulation thus prescribed; the other that they must take the advice of the Conseil d'Etat. Very often the law merely states principles. The administrative regulation fills in the details and matters of procedure, without which the execution of the law would be very difficult, perhaps even impossible. In this way, the Conseil d'Etat is therefore directly associated with the measures which ensure the application of the law, both as far as the administration and as far as the citizen are concerned. This is the principal administrative function of the Conseil.

A word should be added about the individual tasks of the members of the Conseil d'Etat. They are logically connected with its administrative functions. These tasks, indeed, are not laid down by the law. They are entrusted to certain members of the Conseil personally, as a matter of custom and tradition. They are authorised by the law regulating the status of the Conseil. They are allotted by the government, which wishes to profit by the knowledge and experience of the members of the Conseil d'Etat in matters of high administration, and in directing the public services. Thus, by a standing tradition, the Heads of the Ministers Cabinets and the Heads of Department in the Ministries are often chosen from the members of the Conseil. Diplomacy, too, has made use of the Conseil d'Etat. Several ambassadors have been taken from its members. Again, numerous extra-parliamentary commissions, formed in the ministries to study certain important problems, are presided over by councillors of the Conseil, and other members of the Conseil—Masters of Requests and Auditors—look after the carrying out of the work undertaken by these committees. Finally, there are, at present, about seventy honorary members of the Conseil d'Etat. Some are retired, others have resigned in order to take up other activities. Some have gone into politics. Not long ago, a prime minister was a former member of the Conseil d'Etat. Several are in the cabinet. About thirty-five honorary members take a leading part in private business: railways, banks, electricity, metallurgy, insurance. The Conseil d'Etat is thus also a reservoir of statesmen, diplomats, administrators, and business men.

Judicial Functions

The function which the Conseil d'Etat exercises as Supreme Tribunal in administrative matters is one of the most original and best conceived of the legal and political institutions of France. It is the result of a long historical evolution. It marks, in a sense, the epilogue to a long struggle between Monarchy and Parliament. It was in order to end this struggle, to free the central power from the tutelage which the courts arrogated to themselves, that the Constituent Assembly, at the beginning of the Revolution, decreed a separation of administrative and judicial power. This was the object of the law of the 16th–24th August, 1790, which is still in force. It has a twofold effect. On the one hand, it forbids the judicial authorities to interfere with administration; on the other, it prohibits the decision, by judicial authorities, i.e. the ordinary law courts, of disputes between citizens and administrative authorities; whether they be the state, departments, municipalities, colonies; as well as of disputes between various administrative authorities. Now the result of this might be that these disputes were altogether exempt from proper judicial decision, that the administration was judge in its own cause. This is notably the case in Belgium. But this is a defective system, repugnant to our Western ideas of justice. We unanimously deny that the state and other public authorities or bodies should be exempt from the law. If, for historical reasons, French administration is not subject to the jurisdiction of the ordinary courts, it must submit to the control of special courts, for the sake of law and order, and for the protection of liberty. This special court is the administrative judiciary, of which the Conseil d'Etat is the essential and supreme organ. The principle of the separation of administrative and judicial power has therefore, in France, had the effect, not of freeing the state and public administration from any law and judicial control, but of subjecting them to the rules of public law and to the censure of administrative tribunals. This has given excellent results. Administrative jurisdiction enjoys, in France, the well deserved respect and confidence of both those who govern and those who are governed. This juridical function has accordingly developed, under the Third Republic, into the most important of the functions of the Conseil d'Etat, leaving far behind, in importance, its administrative function. The Conseil, reorganised in 1872 principally to assist the Government in its administrative tasks, has, above all, become the judge of the Government.

The judicial function of the Conseil has developed into its cardinal activity, not only by the number of disputes decided,

which has multiplied fivefold since 1872, from 1200 decided in 1872 to 6000 these last few years, but also by the prestige and authority which the Conseil has thereby acquired. It is much better known, to the public as well as to experts, by its decisions than by the administrative opinions given to the ministers.

The development of the judicial functions of the Conseil has different causes—

1. First, the great number of statutes passed under the Third Republic, a number increasing every year in alarming measure. These statutes multiply the law, procedure, remedies. They also increasingly interfere with protected interests (notably fiscal laws). Or they affect certain liberties (once such interference was inspired by certain religious principles; to-day it is a matter of restricting freedom of trade and industry). This excess of legislative activity produces a hypertrophy of administrative litigation.

2. The strengthening of administrative power and the development of public services. The needs of national defence on one hand, electoral exigencies and the socialist spirit on the other, have induced the state to invade, since the beginning of this century, practically every sphere, to issue more and more regulations, and to undertake functions of a social and economic character. Thus, numerous public services have been created; numerous matters have been taken from private law and transferred to public law; the governed have thus seen their contacts with public authority multiply and, with them, disputes which call for administrative jurisdiction. It is true that, at the same time, Parliament has passed decentralising statutes, and that it has, in particular, increased the powers of departmental and municipal assemblies. But local authorities are themselves subject to public law and to the control of administrative tribunals. Thus the measures of decentralisation have increased rather than decreased the judicial function of the Conseil d'Etat.

3. Finally, the Conseil no longer, as before 1872, merely gives opinions to the head of the state—king, emperor, president—thus making it possible for him and the government to ignore the advice. In that way, it was possible for the administration, through its heads, still to be judge in its own cause. The statute of 24th May, 1872, has abolished this state of affairs and substituted for the régime of "Justice retenue" that of "Justice déléguée"; the Conseil is now invested with a proper power, and decides itself in a sovereign manner. Its decisions are enforceable against government, all public authorities and all citizens

alike. The Conseil has exercised its power with skill and independence. It has known how to reconcile the rights of the state, of the various public authorities, and of the police, with the recognised liberties of the governed. The latter have appealed to it with the confidence that they would be judged with impartiality—no matter how important the challenged administrative act may be—and that confidence has helped to develop the judicial function of the Conseil.

The judicial function of the Conseil is exercised by the Litigation Section, which is composed of a President and special members. It is divided into eight subsections, of which four prepare the matters to be judged by the Section and four others judge the matters of minor importance: taxes, local elections, pensions. For the adjudication of very important matters, the law has provided an organ placed above the litigation section: the Plenary Assembly of the Conseil d'Etat, in its judicial capacity, composed of the Vice-President of the Conseil, the members of the Section, and three councillors chosen from the administrative sections. There are thus three judicial organs within the Conseil: the Plenary Assembly for the very important matters, the Section for normal matters, four sub-sections for the smaller matters.

To these various judicial organs is attached a public ministry. It is composed of ten government commissioners or assistant commissioners, chosen from the Masters of Request and the Auditors of the First Class, whose task it is to present conclusions in all these matters. These government commissioners take no orders from anyone. They speak according to their conscience, and in the name of the law.

After having described the instrument, we can now pass to the functions exercised by the Conseil. It exercises its judicial function in three different ways: as court of first instance on matters of common administrative law; as court of appeal and as court of revision (cassation).

1. The first function is the most important. The Conseil d'Etat is a court of common law in administrative matters: that means that when a dispute comes under administrative jurisdiction, and the law has not specially declared another administrative tribunal competent to decide it, the matter must, by common law, be brought directly before the Conseil d'Etat, which judges in first and last instance. The principal administrative matters are judged by this means, and the most important of them are the following: claims based on *excès de pouvoir*, that is pleas for the annulation, on the ground of illegality, of administrative acts; actions claiming state responsibility; disputes

arising from most of the contracts concluded by the state; actions demanding interpretation of governmental acts, and, in particular, of decrees made by the head of the state under ministerial responsibility.

In all these matters, the Conseil d'Etat has the direct and exclusive power of decision. But its powers are not identical in all of the matters just mentioned—

1. When appealed to against *excès de pouvoir* (*ultra vires*), the Conseil does not enter into the substance of the matter and does not give any opinion on the way in which administrative discretion has been exercised; it solely judges the legality of that act; it can neither modify it nor substitute another one, nor give instructions to the administration; its only alternative is to reject the appeal if the act is legally correct, or to annul it if it is illegal. (*Contentieux d'annulation.*)

When appealed to for an interpretation of an administrative act the power of the Conseil consists solely in making a declaration which interprets the meaning of the act. (*Contentieux d'interprétation.*)

Finally, in matters of contract and state responsibility, the Conseil fully examines the facts and the law. It proceeds as in an ordinary action, and is entitled to impose damages upon the Administration (*contentieux de pleine jurisdiction*).

2. The Conseil d'Etat acts as Court of Appeal, when, for practical reasons, and to alleviate the task of the Conseil d'Etat, the law gives jurisdiction of first instance to certain subordinate administrative tribunals. These are, above all, the interdepartmental Conseils de Préfecture, and the Conseils du Contentieux Administratif in the Colonies. The Conseils de Préfecture are mainly competent in matters of indirect taxation, public works, and actions brought against departments and municipal bodies. The Conseils du Contentieux Administratif in the Colonies are competent for disputes concerning local administration. These two jurisdictions, which are, in the administrative system, of an exceptional character, never represent the final instance, and are always subject to appeal to the Conseil d'Etat.

3. As a Court of revision, the Conseil does not sit in many cases. It is mainly in regard to the Cour des Comptes, the Army Revision Councils, and the regional Pension Tribunals that it acts as Court of Revision. In that capacity the Conseil solely pronounces on the question of law submitted to it and never enters into an examination of facts. When it deems the decision to be contrary to the law it annuls it without substituting itself another decision, and sends the matter back to the Court of first

instance. This part of its jurisdiction, therefore, belongs to the *Contentieux d'annulation.*

In conclusion, I should refer to certain legal matters, in which the work of the Conseil d'Etat has proved to be of a particular creative and pretorian character. Of those I am going to discuss three: *excès de pouvoir,* public responsibility, administrative contracts.

The *"recours pour excès de pouvoir"* is an action by which a subject demands the annulation of an illegal administrative act. By means of this action, any citizen can compel the administrative authorities—however highly they may be placed in the administrative hierarchy—to respect the law. No executory administrative act, whether that of a part in the administrative state machinery, or of some secondary public body, i.e. of a department, a municipality, or a colony, is exempt from this remedy. Only judicial and parliamentary acts are, of course, exempt, for they are not administrative acts. By constant legal tradition, certain acts of State, viz. diplomatic acts and the relations between Government and Parliament are exempt. Subject to these reservations, no administrative authority is immune from the control and the censure of the Conseil d'Etat, from the humblest official to the Ministers, even to the President of the Republic, who, in the exercise of his administrative and rule making powers, has his measures cancelled by the Conseil d'Etat, if they are not in conformity with the law. But the remedy is open only to him who can show an interest in the cancellation of a particular act, that is to say, if it has in some way prejudiced the claimant. A large number of decisions of the Conseil exists on the nature of the interest required to bring the action for *excès de pouvoir,* and it has resulted in opening it, to a large extent, to the citizen. All the more so as formalities and costs are negligible. A sheet of stamped paper is sufficient to file the appeal. The appellant can send it direct, without the intervention of a lawyer. The appeal must be filed within two months of the act complained of. There are practically no costs.

Now some words about the reasons for which the Conseil d'Etat will cancel an administrative act on the ground of *excès de pouvoir.* They are: incompetence, defect of form, abuse of power, violation of the law or of acquired rights. Nothing need be said about the first two grounds, but the last two are of great interest. By violation of the law one must understand not only the violation of texts (statutes, regulations, decrees), but also the erroneous application or interpretation of these texts. In a general way, this includes the violation of all legal principles

which have created legal rights, and mistakes of law or fact in the motives of the administrative act in question. It is even possible to go further and speak of a violation of law when the law has been applied under circumstances of fact which did not justify such an application. It follows from this that the Conseil d'Etat, although in matters of *excès de pouvoir* it judges purely on the legality of the measure, nevertheless has the right to examine the facts in so far as the examination and appreciation of facts appear to it indispensable for the discovery of an illegality. In this way, the Conseil has extensive powers of investigation.

But it is chiefly in matters of abuse of power (*détournement de pouvoir*) that the function of the Conseil d'Etat is interesting. By *détournement de pouvoir* one understands the exercise, by an administrative authority, of its powers for a purpose other than that for which the law has conferred the power. Such an act has all the appearances of legality. The authority acted within its competence; the legal forms have been observed; the letter of the law has been obeyed. And, nevertheless, this act is not legal because its author has used his powers and all the appearances of legal regularity in order to do something which he had no right to do. He has not carried out the purpose of the law, has not acted in the general interest; he has abused his powers in order to pursue an objective contrary to the objects of administration; he has committed an error often due to bad faith and malice. Thanks to *détournement de pouvoir*, the Conseil d'Etat keeps a watch over administrative morality.

The appeal for *excès de pouvoir* is the most important monument of public law and administrative jurisdiction. It is also the most useful one. It gives to the Conseil d'Etat the weapon by which it can ensure, within the administration and the activities of the state, the sovereign reign of the law. It makes of the Conseil d'Etat the unchallenged head of all administrative authorities. In other countries, notably the United States, certain institutions, like the Supreme Court, protect the citizen from an abuse of the law. It is done by means of controlling the constitutionality of laws. In France the law is supreme, and no authority can suppress or twist it. There is no remedy against the law itself, however objectionable or even unjust it may be. But, on the other hand, the state and all public authorities are subject to the law no less than the citizen. When a country has an administration which is powerful, autonomous, and has the power of coercion, it is vital that its activities should be circumscribed within the limits of the law. Without it order and liberty could

not be maintained. This task of legal discipline is upon the Conseil d'Etat, which has carried it out with wisdom, impartiality and competence, by means of the remedy for *excès de pouvoir*.

It remains to say a few words about two other original creations of the Conseil d'Etat: responsibility of public authority and administrative contracts.

1. Public power in France is, in all its grades and ramifications, liable to pay damages for its actions. The theory of responsibility is based upon a fundamental distinction: when the damage is caused by the personal fault of an official, that is to say a fault which reveals human weaknesses and passions on the part of that official, he alone is responsible, and an action will lie against him before the ordinary law courts. If, on the other hand, the damage is attributable to a defect, a fault in the functioning of the public service, the administration is responsible, and the injured person has to sue before the administrative jurisdiction, the particular public body which has functioned deficiently, state, department or municipality. This responsibility is not governed by the Code Civil, or by any other Statute. It has been entirely created by the judgments of the Conseil d'Etat. It is based on equity, and has its source in either an administrative fault or a special risk. It gives to the victim a right to full compensation (integral reparation). I do not know of any legal system which admits an equally far-reaching liability of the state and other administrative units. The French doctrine is hard, but infinitely equitable and just, and it protects a citizen against a prejudice from which the public authority might profit, while, on the other side, it compels all administrative authorities to act regularly and normally.

2. As for administrative contracts, suffice it to say that here, too, the Conseil d'Etat has created an autonomous juridical régime which is largely different from private law, and which tends to reconcile the traditional principles of contracts with the necessities of public service, for which it is the object of administrative contracts to provide. The Conseil d'Etat has developed its theory of administrative contract in particular under the impulse of the war of 1914 and of post-war developments. The principal part of this theory is in regard to concessions for public services. Its decisions in this matter have evolved the famous theory of "lack of prevision" (*imprévision*) which has no analogy in private law, and which, while maintaining the essential aspects of existing contracts, has obliged the authorities which give the concessions to come to the assistance of the concessionaries; it has thus made it possible to adapt contracts to circumstances,

by reconciling the exigencies of equity with the well understood interests of the public services.

In conclusion, some general observations might be made. It is through its judicial function that the Conseil d'Etat has arrived at imposing certain lines of conduct to government and administration, and at ensuring internal administrative discipline. I would explain this amazing phenomenon by the great liberty left to the Conseil d'Etat in regard to the written law. Administrative law is, in France, the only branch of the law which is not codified, and which therefore lacks rigidity. The principal categories of administrative litigation are not regulated by any text. Often even the principle is not based on legislation. This has left the way open to a creative and truly pretorian activity of the Conseil d'Etat. This work, which is of exceptional value, is due, to a large extent, to the absence of codification. And this leads to another observation: The Conseil d'Etat practises, in fact, the oldest traditions of administrative jurisdiction, those which were esteemed before the legalists of the fifteenth and sixteenth centuries, and were, by the way, common to England and France. And it is interesting to note that it is the administrative jurisdiction set up, in France, against the judicial authority, which applies the traditional principles of the administration of justice much more freely than judicial authority; those principles which we have inherited from Rome and which envelop our civilisation. It is all to the honour of our Conseil d'Etat. It shows the extent of its success. It also proves that, above all institutions and written laws, we know how to maintain the imperishable traditions of the Occident.

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LIBERAL TRENDS IN PRESENT-DAY COMMERCIAL LAW

SOME ten years ago the present writer had occasion to survey some of the more notable disagreements which have arisen between the Courts, in declaring what the law is, and the business community in its contention as to what the law ought to be.[1] He found that the principal source of difficulty had been the doctrine of precedent. This had led to the development of a system of rigid rules which with the growth of new methods of commerce had proved a hindrance to progress. An additional factor had been the tendency, inherent in all legal systems, towards a purely legalistic or logical conception of development in which the system tends to an ideal form, inherent in its premises and lacking regard for the actual conditions which prevail in the world of action. It is not, of course, possible for any legal system to develop for long in such a way, and for it to do so at all the legal profession must have become a powerful and independent force in society. Law is in the end the expression of fundamental social and economic forces which must have their say, but adherence to precedent and legalistic conceptions may distort its growth and make it the less able satisfactorily to perform its function of oiling the machinery of society. Whatever the type of society, be it feudal, capitalist, or socialist, the law should, and in the end will, adapt itself to playing its part in the functioning of the prevailing system. The more consciously lawyers work towards this end, instead of devoting all their energies to the mere artistic building of a legal edifice of which the foundations are legal maxims, e.g. of the common law, and the tricky rules and subrules logically deduced therefrom, the fewer maladjustments will occur in society, the less friction and the more well being. It is not, of course, suggested that lawyers should have no other objectives, but this is not the place for a discussion of what these should be.

In English mercantile law ever since the time of Lord Mansfield, who was the most eminent of all exponents of the latter method, there have not been wanting many distinguished lawyers in both these schools. During the period following the war of 1914–18 there have been a number of developments of considerable importance, some of which it may be profitable to survey in outline. It appears to the writer that the judges who have been responsible for these have, particularly in the last ten years, belonged predominantly to the school of Lord Mansfield. The

[1] See *The Conflict of Law and Commerce*, 48 L.Q.R., p. 51.

movement on the whole has therefore been liberal in outlook, that is to say, it has tended to pursue that line which commends itself to the business community. I shall attempt in the following pages to indicate some of the outstanding developments in several different branches of commercial law, but the space at my disposal will not enable me to cover more than part of the ground.

The discussion of these trends involves some attempt to appraise the work of contemporary judges, the majority of whom are fortunately still with us, always a delicate and invidious task. Certainly the judges of the period under review, whatever may be said of their efforts in other directions, need not fear comparison with their predecessors in the field of commercial law. Almost all of those whose contribution has been outstanding had, when at the bar, practised in the Commercial Court. This was perhaps to be expected, but nevertheless reflects the high standard of ability prevailing among the practitioners in that Court.

At the beginning of the period Lord Sumner is the predominant figure. His influence was on the whole conservative, and his outlook legalistic. His main impress upon the law had probably been made before our period opens, but his mind at once acute and powerful continued to play a dominating part in all commercial appeals to the House of Lords for a number of years thereafter. Nevertheless his conservatism was not ingrained, and he had, as he once informed the present writer with some pride, been a great radical in his youth. This from time to time became resurgent in his judgments, witness his powerful dissent from the stupid and reactionary decision in *Russel* v. *Russel*, and instances are not wanting in the domain of commercial law. Scrutton, L.J., who had perhaps more of the genius of the common law, had a less disciplined mind, and his judicial career can only be described as wayward.[2] Nurtured like Lord Sumner in the strictest school of Cobden, his quick intelligence observed not without spasms of sympathy a new world drawing away from the old philosophy. He lacked, however, the patience and mental discipline, ever thoroughly to adjust his outlook, and there is accordingly in his judicial lifework a lack of that homogeneity which, for example, so magnificently characterises Justice O. W. Holmes. Lord Atkin, for so many years the colleague of Scrutton, L.J., in the Court of Appeal, possesses just that extra power of adjustment to the requirements of his age, and with his appoint-

[2] Pace Professor Karl Llewellyn whose eulogy of Scrutton, L.J., in xxxvi *Colombia Law Review*, p. 669, sub. tit. Warranties of Quality and Society the present writer cannot altogether accept, great as is his admiration for the best work of the learned Lord Justice.

ment as a commercial judge the new era of liberal decisions may be considered to begin. Since he is still fortunately hard at work moulding the law it would perhaps be injudicious to attempt a close estimate of his work in these pages. The same applies to the work of Lord Wright, who has brought profound knowledge and robust intellect to the service of the same conception of judicial work, to Lord McMillan whose liberal temperament inclines him in the same direction, and to a junior commercial colleague such as Lord Porter. In the Court of Appeal also the tradition has been maintained, if less strongly, and we shall find the names of ex-leaders of the commercial bar such as Greer, McKinnon, and Goddard, L.JJ., together with others whose experience had lain in the more general field of the common law, as du Parcq, L.J., prominent in the case law. It is a commonplace that the Chancery Division has for years tended to produce rather a technical outlook. Sir Wilfred Greene, the first Master of the Rolls for many years to be bred in that Court, has nevertheless already shown that he is in the liberal tradition.

The note of the tendency which we are to examine is struck, and played upon, perhaps a little shrilly by McCardie, J., in *Prager* v. *Blatspiel*.[3] He was concerned with that useful and very underdeveloped doctrine agency of necessity.[4] We are not concerned to go into this problem, but it may be hazarded that true agency of necessity only arises in cases where one person purports to act on behalf of another in an emergency without having any authority from him at all. It should be distinguished from the case of an agent who in an emergency acts beyond the scope of his authority. Actually the two types of case are not distinguished in the decisions, though the point is made clearly enough in that admirable book *Story on Agency*.[5]

A priori one would expect that when an agent handling his principal's business was faced with a sudden emergency which endangered his principal's property or interests, but which he was not competent to deal with on the basis of his expressed authority his authority would by implication be extended so as to enable him to face the difficulty. It should be more than lawful for him to do so, it should be his duty to take such steps as seem proper to protect his principal, provided, of course, that he is not in a position to obtain instructions. This problem must have arisen frequently in practice, and principals must have been only too glad to accept the actions of their agents. As far as the law

[3] [1924] 1 K.B. 566.

[4] This is a subject on which there is little authority and what there is is confused. It would repay enquiry.

[5] See § 142.

goes it seems to have been first considered in connection with shipmasters, and during the earlier part of the nineteenth century a considerable jurisprudence grew up on the subject, in which the right of the shipmaster to act in emergency was laid down and regularised.[6]

The green shoots of this promising doctrine were glared upon with Medusa-like effect by Parke, B., archpriest of the legalistic school, and withered.[7] In *Hawtayne* v. *Bourne*[8] he had to deal with a case where the manager of a mine had been faced with a threat by unpaid miners to seize and sell the machinery and tools at the mine, and had borrowed money to pay their wages in order to prevent this happening: surely sensible and enterprising action on his part. Dealing with the question of agency of necessity the learned baron expressed the opinion that this could only arise in cases of shipmasters and acceptors for honour of bills of exchange, and held that the manager's action was not binding upon his principals. This view was accepted and followed by Lord Esher, M.R., in the well-known case of *Gwilliam* v. *Twist*.[9]

In *Prager* v. *Blatspiel*[10] McCardie, J., stepped out of this current, and accepted the more liberal doctrine enunciated by Story who considered that an agent is always justified in acting beyond his authority when necessity requires.[11] The problem was the practical and comparatively simple one of a buying agent in this country who had purchased goods which owing to the war of 1914–18 he was unable to forward to his principal abroad. Actually the goods in question which were furs were of a kind which could easily be stored so that the agent was under no necessity to act as he did by selling. Had the goods been perishable or of an ephemeral type the agent would have been acting in accord with common sense, and in the view of McCardie, J., with common law also if he had sold them on his principal's behalf. In the course of his judgment the learned judge gave vent to some observations of a general character which have been much quoted and not always with approval. He said[12]:

[6] *Cf. Notara* v. *Henderson* (1872), L.R. 7 Q.B. 225.

[7] Pollock, C.B., who was certainly a less eminent lawyer, called him "the greatest legal pedant that ever existed." See Hanworth Lord Chief Baron Pollock, p. 198.

[8] 7 M & W 595.

[9] [1895] 2 Q.B. 85—the case of the driver and conductor of an omnibus entrusting the driving to a third party in an emergency. The question of communication with the principal which chiefly occupied the attention of the other members of the Courts in these cases has been disregarded for the purpose of this argument.

[10] *Supra.*

[11] *ut supra.*

[12] *Ibid.*, at p. 570.

"The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, as far as it can, sets of facts abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances—unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law." He goes on to quote the well-known passage from the judgment of Bankes, L.J., in *Rex* v. *Electricity Commissioners*,[13] where he says "it has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances." The statement of McCardie, J., is of greater value as a declaration of policy than as a foundation for his decision in the case which he was deciding. All that he had to consider was whether in an emergency an agent may bind his principal by going beyond the scope of his actual authority in order to protect his principal's interests. But while in the nineteenth-century cases the Courts had set their faces against a liberal view of the agent's authority, McCardie, J., was prepared on the basis of the juristic principle formulated in the passage just quoted to adopt it. It may be said that this was entirely in accordance with the view of Story, a contemporary of and as great a common lawyer as Parke, B.[14]

In *Jebara* v. *Ottoman Bank*[15] the plaintiffs had in 1914 sent goods to Turkey and forwarded the documents to the defendants to present and obtain payment. Norwithstanding the outbreak of war, on which the defendants became enemies of the plaintiffs, they handed the documents to the buyers. Although the defendants had not claimed to act as agents of necessity it was afterwards contended that their action was justifiable on that ground. In the view of the Court of Appeal however as soon as the defendants became enemies not only did their existing authority disappear but they became quite incompetent to do any act on behalf of the plaintiffs. What they had done was therefore a conversion.[16] On its peculiar facts this decision does not really throw any light upon the problem of agency of necessity. It is necessary, however, to refer to the judgment of Scrutton, L.J., the only member of the Court who discussed the problem. The temperament of the learned lord justice was somewhat antipathetic to that of McCardie, J., and he comments rather

[13] [1924] 1 K.B. 171, at 192.
[14] See story on Agency, § 142.
[15] [1927] 2 K.B. 254.
[16] It may be noted that the House of Lords took a somewhat different view of the facts, [1928] A.C. 269.

acidly upon his effort in *Prager* v. *Blatspiel*[17] to expand the doctrine of agency of necessity "without clearly defining the limits, if any, of its expansion." He appears to be unaware that McCardie, J., was dealing with a case of subsisting agency (an error shared by the reporter of *Prager* v. *Blatspiel*[18] in his headnote when he treats the agent as if he had been a seller) for he says "the expansion desired by McCardie, J., becomes less difficult when the agency of necessity develops from an original and subsisting agency"[19] which was exactly the expansion suggested in Prager's case. He then refers with apparent approval to the limiting judgments of Eyre, C.J., in *Nicholson* v. *Chapman*[20] of Parke, B., in *Hawtayne* v. *Bourne*[21], and of Lord Esher, M.R., in *Gwilliam* v. *Twist*.[22] In other words he throws his weight on the side of following precedent, even when the precedent consists only in dicta.

Contrast the attitude of the Privy Council as reflected in the advice of Lord Wright in the recent case of *Firm of Yokal Chand-Jagan Nath* v. *Firm of Nand Ram Das-Atma Ram*.[23] Here the respondents were commission agents employed by the appellants in connection with the sale of their merchandise. Certain of the buyers whom they had introduced got into financial difficulties, and the respondents, concluding that, if anything was to be preserved from the wreck for the benefit of their principals, they must act quickly, accepted part payment on account, giving credit for the balance. Such action, is clearly beyond the competence of an agent of this type, and the principals sued them for breach of duty, a somewhat ungrateful action. The Privy Council considered however that in such circumstances, which in effect means in case of emergency, it is the duty of the agent to act in the best interests of his principal. The appellants could only have succeeded if they could have shown that the respondents had failed to get in cash which by reasonable exertions they could have obtained. It is interesting to notice that the action of the agents was not justified on the basis of agency of necessity, although it had resulted from the necessity of the circumstances in a commercial sense.[24] None of the earlier cases were in fact

[17] *Supra.*
[18] *Supra.*
[19] *Jebara* v. *Ottoman Bank* at *supra*, at p. 271.
[20] 2 H. Bl. 254.
[21] *Supra.*
[22] *Supra.*
[23] 55 T.L.R. 15 (which opens up the possibility of an article on the poetry of case names).
[24] As to which see *per* Sir Montague Smith in *Australian Steam Navigation Co.* v. *Morse* (1872), L.R. 4 C.P. 222, at 230.

referred to, but the result appears to approximate very closely to the view of the law laid down by Story.[25]

Turning to the law of marine insurance we find developments of great importance in process of emerging, which in one case at any rate will probably affect other branches of insurance law. I refer to the modification of the principle of insurable interest recently achieved. This principle, obviously of fundamental importance, has given rise to many practical difficulties, and these have led to a considerable disregard in business of the legal rules. It is well known that originally no such principle existed. It was introduced in marine insurance as a result of the scandals to which its absence naturally gave rise, by a statute of George II[26] and had afterwards to be extended to other types of insurance by the well known Gambling Act.[27]

Unfortunately the principle, salutary enough in itself, was developed by the Courts on legalistic lines. This did not appear at once for in the best known judicial pronouncement on the subject, that of Lawrence, J., in *Lucena* v. *Crawford*,[28] a certain fluidity is still obvious. The learned judge says that "a moral certainty of advantage or benefit" establishes an insurable interest, and again that it is sufficient "to derive benefit" from the existence of a thing or "prejudice from its destruction," a view which is incompatible with the later case law which was codified in the Marine Insurance Act, 1906. This requires that the interest must be of a legal or equitable nature.[29] Now it is obvious that many genuine business interests cannot be reduced to terms of law or equity, and this is especially so with regard to profits, which have always been a source of difficulty. An importer of merchandise has a "moral certainty" of making a profit on his transactions, and if his goods are lost while still at sea he loses not only the value of the goods, which of course he can insure, but his hypothetical profit, which is not a legal or equitable interest. But an insurance on such profits whether based on an intelligent forecast, or on the average of previous years, could not be described in any real sense as a wager, which is after all what the principle of insurable interest was invented to prevent.

The practice had, in fact, grown up during the eighteenth century of effecting insurances upon expected profits and this had been accepted by the Courts.[30] Afterwards the stricter rule

[25] *Ubi supra.*
[26] 19 Geo. II, c.37.
[27] Life Assurance Act, 1774, 14 Geo. III, c.48.
[28] (1806), 2 B. & P. N. R. 269, at 302.
[29] 6 Ed. VII, c. 41 s. 5 (2).
[30] See *Grant* v. *Parkinson* (1,731) 3 Dougl. 16 and *Barclay* v. *Cousins* (1802), 2 East 544.

was adopted that the insured must be able to prove that he would have made a profit,[31] a doctrine not followed in the U.S.A.[32] where the liberal tradition of Lord Mansfield has, generally speaking, continued to dominate the administration of commercial law. Another qualification upon this type of insurance is that the insured must actually own, or have contracted to buy, the goods which were lost. Although even in its modified form the doctrine of insurances of anticipated profits is not easily reconciled with the words of the Marine Insurance Act, 1906, it is generally considered that such insurances are valid.[33] Nevertheless the law has not gone far enough to satisfy the exigencies of commerce, and moreover there are other interests of a business character which do not come within a strict construction of the act, and in regard to which the efficacy of insurances must be regarded as more than doubtful.

These difficulties have had to be surmounted, because it is essential to commercial stability that such risks should be insurable. The method adopted has been the well-known "honour policy" by which the insurer admits the interest of the insured, and binds himself in honour to pay losses falling within the insurance. Such policies are of course void in law.[34] But questions of construction and other problems frequently arise in connection with them, which ought to be, and on occasion actually have been, decided by the Courts. We have thus witnessed the somewhat undignified spectacle of the judge behaving like Nelson at the battle of Copenhagen, and pretending that he is unaware that the policy on which he is passing judgment is in reality void.[35]

A region where this doctrine has given rise to much difficulty has been that of freight, which has had a long and complicated case history. Immediately after the passing of the statute[36] above referred to a very strict rule was established by Lee, C.J., a judge whose influence on the law merchant was seldom beneficial, in *Tonge* v. *Watts*[37] where he held that there was no insurable interest in freight until the cargo was actually on board ship. It is not our purpose here to describe how step by step and over a period of something like a century this doctrine was gradually

[31] *Eyre* v. *Glover* (1812), 16 East 218.
[32] See Arnould on *Marine Insurance*, 12th ed., § 287.
[33] *Cf.* Arnould *la. cit.*
[34] Marine Insurance Act, 1906, s. 4 (2).
[35] In *Buchanan* v. *Faber* (1899), 4 Com. Cas. 227, n. Bigham, J., after consulting Mathew, J., took the preferable course of announcing that he proposed, with the consent of the parties, to hear a case on an honour policy and to disregard the p.p.i. clause. This was before the Marine Insurance Act, 1906, but it is well known that honour policies have been before the Courts since that time.
[36] 19 Geo. II, c. 37.
[37] (1746), 2 Str. 1251.

liberalised. The upshot was to establish the rule that, provided a contract of affreightment has once been concluded under which freight will be earned and some step has been taken towards carrying it out, an insurable interest in freight arises.[38] Shipowners have never been satisfied with the position so laboriously reached, for even if an insurable interest arose as soon as the contract of affreightment was concluded (certainly an arguable proposition) it would not cover a number of possible cases of loss. When a ship becomes a total loss it may not be possible to replace her for some time, so that profits are lost. Again the time charterer of a vessel who uses her in the carrying trade may lose profits if she becomes a total loss during the currency of the charter-party. As long ago as 1905 Walton, J., threw out the hint that a shipowner may have an insurable interest in the use of his ship quite apart from questions of freight.[39] Notwithstanding the support given to it by successive editors of Arnould[40] this somewhat revolutionary suggestion does not appear to have been taken up at Lloyd's. It became usual to effect insurances on freight "as if chartered," but Lord Sumner (when Hamilton, J.) expressed the view that this did not cover expected freight not yet contracted for.[41] Recently, however, a type of cover on "anticipated freight" has come into use, evidently based on the policies on anticipated profits already discussed. This is intended to cover the case of a ship being sent to a port where she hopes to pick up a charter-party, or where her owner intends to put her up as a general ship. It is obvious that here again we have a genuine commercial interest in the freight which it is expected will be earned, but it is equally obvious that there is no legal or equitable interest in any technical sense of those terms. Nevertheless, in *Robertson* v. *Petros M. Nomikos*[42] where the policy was on freight "chartered or unchartered"[43] Lord Wright said "the intention may be to secure that even if the vessel at the time of the casualty has no cargo on board (that is, is in ballast) and has no charter, there shall be no question of insurable interest. . . . The intention may be to provide that the owner's interest in the profit earning capacity of his ship, which is certainly a good interest in a business sense, should be deemed a sufficient interest for purposes of this policy.

[38] See the authorities discussed in Arnould, § 263, *et seq.* The position is not free from doubt, and the position taken up by the editors of Arnould is perhaps more liberal than a narrow reading of the authorities would allow.

[39] *Manchester Liners* v. *British & Foreign Marine Insurance Co.* (1901), 7 Com. Cas. 26 at p. 33.

[40] *Ibid.*, § 288.

[41] See *Scottish Ship Line, Ltd.*, v. *London & Provincial Insurance Co.*, [1912] 3 K.B. 51 at p. 63.

[42] [1939] A.C. 371 at p. 384.

[43] Clause 5 of the Institute Clauses, below, p. 283.

I should see no legal obstacle why this agreement should not receive effect." Now it is certain that the parties cannot by contract establish an insurable interest where the law does not recognise one.[44] Hence it is clear that in Lord Wright's opinion the question of insurable interest does not depend on whether there is a contract of affreightment in existence, provided a genuine interest in a business sense exists. This is a test after the heart of the business community, and one which if laid down in the beginning might well have prevented the whole growth of the honour policy system, and all the trouble to which it has given rise.

Lord Wright's statement was, however, *obiter*. It has now been followed by Goddard, L.J., sitting as a judge of the King's Bench in *Papademitriou* v. *Henderson*[45] where the insurance was on "freight and/or chartered freight and/or anticipated freight" valued at £3500. During the currency of the policy which was for three months the vessel was seized by the Spanish insurgents, and detained by them during the remainder of the three months period. After the voyage on which she was engaged when seized the vessel had a charter-party for a voyage to Hamburg which port she would have reached in the normal course of events with time for another voyage; but she had no further contract. The voyage to Hamburg would have earned £2842, and the learned judge held that the vessel would have had no difficulty in earning the balance of £658 by obtaining employment at Hamburg. He held that there was sufficient to establish an insurable interest in "anticipated freight." He said:[46] "In my opinion I ought to give effect to the clear terms of the policy. The parties are saying 'I, the shipowner, have a profit-earning ship, a ship with which I can earn profit, and I want to insure that, if this ship is seized during the time that the policy is current and effective, I shall recover a certain sum which is "anticipated"; because I anticipate that I shall be able to earn at least that sum, if not more, during the period.' "

The Courts have also been occupied with difficult and important points relating to constructive total loss. The doctrine of constructive total loss is in some ways the most interesting problem which arises in connection with insurance law. It goes back to early times in the history of marine insurance, and affords an excellent example of how the exigencies of business produce legal rules for dealing with them. When a casualty occurs during

[44] Marine Insurance Act, 1906, s. 4 (2).
[45] (1939), 55 Com. Cas. 29.
[46] At p. 40.

a voyage there is obviously going to be a possible difficulty in deciding as to its extent; is it really a total loss or is it going to be possible to effect repairs? Or perhaps the vessel is under the jurisdiction of a Prize Court: is she going to be condemned, and therefore lost, or released? Now one very important point is as to who is to bear the loss of the delay caused by these matters, the insured or the insurer. The insured is a business man to whom his capital is his essential tool. He must not have it locked up while investigations are being made, or legal machinery is grinding out its decisions. The insurer therefore takes this extra risk. He pays for a total loss, and in exchange he takes over the subject-matter of the insurance, for loss or gain.

In early times the essential feature of this doctrine is the abandonment of the insured property to the insurer. Indeed, it is a doctrine of abandonment rather than of constructive total loss, a phrase which appears, as far as I know, comparatively late. To the legal mind it is rather an anomaly. How can a ship, which may be quite easily if expensively repaired, be a total loss? Is the cardinal principle of indemnity satisfied? It may well be that had not the practice become inveterate before the lawyers really got to work on marine insurance they would have scotched it at birth.

One aspect of the subject which has proved particularly thorny is that of constructive total loss of freight. In most cases where there is a constructive total loss of a ship the loss of the freight will be actual, and there will be no need for abandonment. Even in cases where this is not so it is perhaps difficult to see how the insurer is to gain by abandonment. Nevertheless, cases of constructive total loss of freight appear in the reports from the early nineteenth century, and though not of great frequency they are of sufficient difficulty to merit some twenty-five pages of discussion in Arnould. In spite of this the Marine Insurance Act, 1906, which purported to codify the law is completely silent on this topic, a silence said to be due to the fact that the eminent lawyers who considered the bill in draft were unable to agree as to what the law really is on the subject![47]

As has been already indicated, the main problem in connection with total loss of freight arises from the fact that it involves a preliminary casualty to the vessel or her cargo. Nevertheless these matters are from a legal point of view independent of the freight insurance, so that if a vessel is seized by a government and abandoned to underwriters as a constructive total loss, the

[47] See *per* Scott, L.J., in *Kuludundis* v. *Norwich Union Fire Insurance Society, Ltd.*, [1937] 1 K.B. 1.

freight may nevertheless be earned by the latter, so that it cannot, legally speaking, be said to be lost, although the insured himself has not had it.[48] Surely a narrow and legalistic rule. But suppose that although the freight-earning vessel is so badly damaged as to prevent her earning her freight, the owner prefers to have her repaired rather than abandon her to underwriters, and claim on his policy, a course which he may well adopt if values are rising rapidly. The freight here, too, is lost, and therefore, commercially speaking, should be recoverable from the underwriters. At first sight it is difficult to see how there can be a constructive total loss of freight without the preliminary loss of the vessel, and for a Court inclined to take a legalist attitude this would certainly afford a ground for deciding against the liability of the insurer.

This matter came up for discussion in *Robertson* v. *Petros M. Nomikos*[49]. Here, as in other recent cases on this subject, the insurance was effected on the terms of the Institute clauses, those relevant for our purpose being as follows—

(5) In the event of the total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full whether the steamer be only partly loaded or in ballast, chartered or unchartered.

(6) In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value.

(8) Warranted from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

The freight-carrying vessel was chartered by the respondents to proceed to Venezuela for a cargo and insured with the appellant underwriter. Before proceeding to her loading port she was docked at Rotterdam for repairs where she was so seriously damaged that the chartered voyage had to be abandoned. Her owners, however, found that owing to the increased value of shipping it would pay them not to claim for a constructive total loss but to have her repaired and claim for a partial loss. They claimed, however, on their freight policy for a constructive total loss under clause 5 of the Institute clauses. The insurer contended that there had never been a constructive total loss of the vessel, and that in any case the loss was due to the delay, and therefore defeated by clause 8 (as to which see the *Carras Case* below). In the Court of first instances Goddard, J.,[50] accepted the view

[48] *M'Carthy* v. *Abel* (1804), 5 East 388; *Scottish Marine Ins. Co.* v. *Turner* (1853), 1 Macq. H. L. C. 334.
[49] [1939] A.C. 371.
[50] (1937), 43 Com. Cas. 103.

that there had never been a constructive total loss of the vessel, since there had never been any abandonment. In the Court of Appeal[51] this decision was reversed on the rather artificial ground that the parties had provided their own meaning for a constructive total loss by means of the above clauses, and that a loss within this meaning had taken place. In the House of Lords, however, where the Appeal was upheld, their Lordships took the bold course of announcing that abandonment is not an essential ingredient of a constructive total loss at all.[52] It is simply a condition which has in most cases to be satisfied before a claim can be successfully made for constructive total loss. Here the respondents *qua* shipowners were not claiming for any such thing, and *qua* freight owners it was unnecessary, since no benefit could accrue to underwriters from it. It could hardly have been contended on any reading of the early authorities that abandonment is not essential to a constructive total loss, and it is significant that none of the learned judges who held to this effect discussed on this topic[53] any of the cases decided before the Marine Insurance Act, 1906. It is unlikely that the draftsman of the Act, the late Sir Mackenzie Chalmers, intended to alter the law which he was codifying, and indeed he starts off boldly with the statement that "there is a constructive total loss where the subject-matter is reasonably abandoned . . ."[54] If the matter stopped there *cadit quæstio*, but fortunately from the point of view of elasticity he had the weakness of almost invariably following up a general definition by a subsidiary clause commencing: "(2) In particular there is a (constructive total loss) when, etc." This may, and in this case did, furnish a means of escape. Further, in section 61 it is enacted that when there is a constructive total loss the assured may either treat the loss as a partial loss or abandon the subject-matter, etc.," which makes it comparatively simple to make hay of the general definition. The draftsmanship of this statute is loose in a number of particulars which is perhaps to be explained by the fact that Chalmers was not very familiar with the subject.[55]

The modern doctrine of constructive total loss no doubt grew out of the right of abandonment, but if it is to be a flexible

[51] [1938] 2 K.B. 603.

[52] See *per* Lord Atkin at p. 377 (he actually speaks of notice of abandonment), Lord Wright at p. 382, and Lord Porter, p. 393.

[53] According to the well-known decision in *Bank of England* v. *Vagliano*, [1893] A.C. 107, this is, of course, correct, but normally speaking judges do not resist the temptation of a short historical disquisition.

[54] Marine Insurance Act, 1906, s. 60 (1).

[55] He succeeded, probably unwittingly, in altering the law on another aspect of constructive total loss, as to which see Arnould, § 1097 (*a*).

instrument fitted to dealing with such commercial problems as those arising from insurances on freight it must part company with its parent, a fact which the House of Lords has wisely recognised.

Two recent cases on the same topic decided by the Court of Appeal may be referred to shortly as indicative of the same tendency. In *Carras* v. *London & Scottish Assurance Corporation*[56] the policy was in much the same terms as in *Robertson's Case*.[57] The freight-earning vessel stranded on the way to Valparaiso, her loading port, and notice of abandonment was given to her hull underwriters who paid a total loss. The vessel was eventually salved and repaired when she was so valuable that on the application of clause 6 above[58] she could not be regarded as a total loss. Porter, J., however, held that there was a loss of the adventure, but that a claim based upon this must fail, because it was consequent on loss of time within the meaning of clause 8 above.[59] He was supported in that view by *Bensaude* v. *Thames & Mersey Marine Insurance Co.*,[60] where an adventure was frustrated by the breaking of the vessel's main shaft, and the consequent loss of freight was held to be irrecoverable owing to the same clause. In the Court of Appeal, however, Lord Wright (then M.R.) held that the loss of freight was not caused by the delay, but by the destruction of the charter-party by the perils of the seas.[61] With this bold argument the other members of the Court of Appeal agreed. It is difficult to see how a charter-party can be destroyed otherwise than by frustration. If it was frustration then where is the intrinsic difference between frustration through the breaking of a shaft, and frustration through the grounding of the vessel? It is true that in the one case there is, as Lord Porter points out in *Robertson's Case*,[62] a particular average loss to the vessel and in the other a constructive total loss of the adventure, but each operates to cause the same kind of loss. The *Carras Case* must be taken as an audacious case of a distinction made for the avoidance of a not very happy decision, and it is one which was accepted in the *Robertson Case* where the argument on loss of time was rejected also.[63]

[56] [1936] 1 K.B. 291.
[57] *Supra.*
[58] It was actually numbered 5 in this particular policy.
[59] Clause 7 in this policy.
[60] [1897] A.C. 609.
[61] At p. 299.
[62] At p. 394.
[63] The same sort of point was discussed very shortly afterwards upon somewhat different facts in *Kulukundis* v. *Norwich Union Fire Insurance Society, Ltd., supra.* It is unnecessary here to enter upon a discussion of the somewhat technical differences.

Turning to the law of carriage by sea, perhaps the most fruitful topic of inquiry is the decisions on deviation. There is probably no example, unless it be the doctrine of rejection in cases of sale[64] of a salutary and necessary principle being pushed to such absurd lengths as this. It is difficult for the ordinary business man, to whom the doctrine is explained, to suppress his irritation, and when the beauty of the logical processes on which it depends is pointed out to him his language on the subject of logic is neither restrained nor polite. To generations of commerce students I have lectured on this topic and taken *Morrison & Co., Ltd.* v. *Shaw Savill & Albion Co., Ltd.*[65] as a convenient example. When I point out to them that the vessel deviated from the London route to Havre in order to discharge a large part of her cargo which was destined for France; that such deviation was due to the risk of meeting an enemy submarine; that after she had started for London again she was torpedoed and lost; but that this loss was not protected by the exception of King's enemies, because if the carrier once ceases to carry out his contract he becomes liable for the safety of the goods in any event, I invariably see a look of incredulity steal over the faces of the class, and no doubt their individual minds are busy formulating for themselves the celebrated proposition of Mr. Bumble anent the law. It is quite true of course that the risk is altered by such a deviation, but the real question should be whether the deviation was reasonably likely to increase the risk judged in the circumstances prevailing at the time it took place.

Nevertheless, since that case things have moved a little bit. In the first place it has been shown that it is possible to draft a watertight deviation clause.[66] In case after case deviation clauses, which have been in use for a long time, have been rejected as not sufficiently widely drafted, until it began to be doubtful whether there was any set of words which could pass the scrutiny of the Court. As Branson, J., said in upholding the clause in the case just cited it marked "a step forward in the contest between shipowners and shippers, the shipowners attempting to keep the order and disposition of their vessels unhampered." But it did more than this, for it marked the introduction of a clause of such an extreme character that the owners might have sent the vessel for weeks in a direction opposite to the voyage agreed upon

[64] See *per* Scrutton, L.J., in *Hillas & Co.* v. *Arcos* (1931), 36 Com. Cas. 353 at 368, and 48 L.Q.R., p. 70.

[65] [1916] 2 K.B. 783.

[66] See *Connolly, Shaw, Ltd.* v. *Nordenfjeldske Steamship Co.*, 50 T.L.R. 418: it is unnecessary to give its actual terms; *Frenkel* v. *McAndrews*, [1929] A.C. 545, may also be referred to, though the issue eventually turned on a subsidiary point.

without apparently losing protection, except that in the case of a perishable cargo the learned judge thought that it would have frustrated the objects of the contract, and might therefore have been disregarded. But shipowners are really not concerned with liberties of this kind; all they want is some latitude for reasonable deviation, now apparently secured in contracts where the Hague Rules apply.[67] If the Courts had construed the earlier and less ambitious clauses rather more liberally it is unlikely that the modern and really outrageous clause would ever have been invented.[68]

Next we must notice that the House of Lords has decisively rejected the view laid down in *Morrison's Case* and other cases[69] that the deviation displaces the whole contract of carriage, depriving the carrier of the right to rely upon its exceptions clauses even for the purpose of protecting himself in respect of incidents occurring before the deviation took place. In *Hain S.S. Co.* v. *Tate & Lyle*,[70] the breach of contract involved in a deviation was equated with an ordinary breach of condition giving the innocent party the usual remedy, viz. the right to treat the contract as repudiated, or to waive the breach of condition—in the words of Lord Atkin: "There is implied an absolute condition not to deviate."[71] On this basis the doctrine, though still capable of working harshly, loses something of its unique and rather terrible character, and it is conceived that the carrier is not prevented from relying upon the terms of his contract to obtain protection against liability for loss or damage which occurred before the deviation. This at any rate appears to have been the view of Lord Maugham, who seems to associate himself with the view[72] that "the charterers became entitled to treat the contract as at an end as from the date of the repudiation," which must mean that it is still subsisting and operative up till that time.[73]

It may be observed that the rigour of the doctrine is well exemplified by the judgments given in this case by the Court of Appeal,[74] more particularly in the discussion on forfeiture of

[67] See Art. IV, r. 4.

[68] See *Morrison, etc.*, v. *Shaw, Savill, etc.*, *supra*, where the bill of lading gave "liberty on the way to London to call and stay at any intermediate port or ports to discharge . . . cargo, etc., but it was held that Havre was not an 'intermediate' port."

[69] *Supra*, and see also *Joseph Thorley* v. *Orchis Co.*, [1907] 1 K.B. 660.

[70] (1936), 41 Com. Cas. 350.

[71] *Ibid.*, p. 354.

[72] Given hypothetically at p. 371.

[73] But see Scrutton on *Charter-parties*, 14th ed., § 99, where the present editors come to an opposite conclusion.

[74] (1934), 39 Com. Cas. 259.

freight after deviation, which this Court unanimously decided must follow. In this argument we get logic pushed to the extreme limit, and the carrier treated as a sort of trespasser *ab initio* in relation to the goods. Greer, L.J., definitely states that after deviation "the goods are carried unlawfully,"[75] and the following passage from the judgment of Scrutton, L.J., applies the legalistic method unblushingly: "The fact that a volunteer without authority renders services to another man's property does not give him a right to remuneration, or to keep the property unless he gets remuneration. There is no authority on the question, but *as a matter of logic* I think the claim for freight fails."[76] The result may follow from the premises, but the premises are absurd; the shipowner can only be regarded as a volunteer by an extravagant legal fiction.

The Court of Appeal would accordingly in their wholehearted pursuit of logic have permitted the goods owner to enrich himself in the most unjustifiable way at the carrier's expense. It is interesting to compare this attitude to that adopted by the Courts towards attempts by one party to a contract to exact a penalty from the other, often with a better moral claim than in this business of deviation. It is interesting also to observe that Scrutton, L.J., forsook the opinion expressed in his own book in the generosity of his youth when[77] he considered that a fresh agreement to pay freight could be inferred from acceptance of the goods under the bill of lading, or, alternatively, a claim could be made on a quantum meruit.

As the case went in the House of Lords it was not necessary to decide this point. The opinion was, however, unanimously expressed that no claim to freight can be made under a contract which has been repudiated. But two members of the House appear to have felt the view revolting that no remuneration could be claimed at all. Lord Maugham emphatically states that the carrier who continues to carry after deviation "is not a wrong-doer."[78] Lord Wright makes it perfectly clear in a powerful dictum, with which Lord Maugham was clearly in complete sympathy, that freight can be recovered on a quantum meruit. He says that "a sweeping general rule such as the Court of Appeal laid down will if it be correct have startling consequences." He then puts the hypothetical case of a voyage from Australia to England with a possible deviation of a few hours, and continues: "It may be that by the maritime law the

[75] *Ibid.*, 284.
[76] See p. 271—the italics are mine.
[77] See Scrutton on *Charter-parties*, 13th ed., § 99.
[78] See. p. 371, and see also *per* Lord Wright at p. 368.

relationship of carrier and goods owner still continues despite the deviation."[79]

A year later we find the Privy Council establishing a new and perhaps important qualification on the doctrine, and showing a tendency towards a new *ratio decidendi*. The deviating vessel had returned to the proper course, but owing to the incompetence of a steersman was run on to a rock and lost.[80] The point at issue was whether the owners had forfeited the privilege of limiting their liability under section 503 of the Merchant Shipping Act, 1893, and it was held that even assuming that they had been privy to the deviation this had nothing to do with the cause of the loss. Now hitherto the doctrine of deviation has not normally been connected with causation in the direct sense. For instance in the *Morrison Case*[81] the loss was not proximately caused by the deviation, but by the explosion of the torpedo. The argument has always been that but for the deviation the vessel would not have been at the place where she was when the loss took place, and it was accordingly laid down in *Morrison's Case* that the carrier can only escape if he can show that the loss must still have occurred had he not deviated at all. In the *Paterson Steamship Case* no evidence to this effect was led at all, though it is clear that the Court attached importance to the fact that the vessel was back on her course.[82] It is difficult to see any logical reason why if a statutory protection is not displaced by deviation the common law exceptions which are much more fundamental should be displaced, and, indeed, the exceptions under the Carriage of Goods Act, 1924, were held to have been displaced by deviation in the *Ixia*.[83] The *Paterson Steamship Case* is a somewhat muddled one, and must perhaps be taken with reserve: at the least it seems to establish, however, that protection revives in some cases when deviation ceases.

One of the most constant sources of trouble in connection with deviation has been the delimitation of the contractual voyage. This is bound to be described as from port A to port B. The literalist is apt to take a geographical route between these two points, and hold that any departure from it is a deviation. It has, however, long been recognised that the carrier is entitled to take, and indeed should take, the route which is commercially usual. It is well known that usage cannot defeat the plain words of a contract and this has given the literalist school the opportunity of

[79] See p. 368.
[80] *Paterson Steamships, Ltd.* v. *Robin Hood Mills, Ltd.* (1937), 58 Ll.L.Rep. 33.
[81] *Supra.*
[82] See p. 39.
[83] [1932] A.C. 328.

preventing the leading of evidence as to what was customary on the grounds that it was irrelevant.[84] In other cases, however, the Courts have gone behind the literal construction of the contract, and looked at the situation in the light of the knowledge of the parties, and the prevailing practice.[85]

It is to be hoped that this matter has been finally set at rest by the House of Lords in the *Reardon Smith Line Case*.[86] In this case the charter-party provided that the ship was to sail from Poti in the Black Sea to Istanbul and thence to an American port. Instead of proceeding directly to Istanbul the vessel went to Constanza for oil bunkers. Evidence was tendered to prove that this was a common practice, and that therefore the route taken was commercially proper. While Goddard, J., accepted this evidence[87] it was rejected by a majority of the Court of Appeal[88] on the ground that the words from Poti to Istanbul were clear and unambiguous, and not to be contradicted by any evidence as to what was commercially usual. And here we have another frequent cause of complaint about the administration of the law. The Commercial Court was founded in order that judges experienced in the law merchant might adjudicate upon mercantile causes. Goddard, J., tried this case as commercial judge, and Greer, L.J., spent many years in the same Court. Nevertheless their views had to give way to those of Slesser, L.J., whose experience had lain in Trade Union Law and Workmen's Compensation, and Clauson, L.J., a master of equity and Chancery practice. But for the intervention of the House of Lords their decision would have nevertheless become a leading authority in commercial law.

In the House of Lords, however, it was held that a proper examination of the authorities showed that they "recognise the necessity of ascertaining what is the understanding of business men on the matter, presumably by appropriate evidence";[89] that the evidence showed that 25 per cent of ships were now calling at Constanza; and that in the circumstances the route was a usual and commercially proper one and did not involve a deviation.

Before leaving the subject of carriage a word must be said about the attempt made by Scrutton, L.J., to torpedo the

[84] *Cf. Glynn* v. *Margetson*, [1893] A.C. 351, and particularly the majority of the C.A. in *Reardon Smith Line* v. *Black Sea & Baltic General Insurance*, [1938] 2 K.B. 730.
[85] *Cf. Frenkel* v. *MacAndrews, supra.*
[86] [1939] A.C. 562.
[87] 42 Com. Cas. 332.
[88] Slesser and Clauson, L.JJ., Greer, L.J., dissenting: see, [1938] 2 K.B. 730.
[89] See *per* Lord Wright at p. 573.

Hague Rules. Notwithstanding the fact that the largely standardised contract of affreightment which is brought into operation by these rules, as given legislative effect by the Carriage of Goods by Sea Act, 1924,[90] represent years of negotiation and compromise by the shipowning, commercial, and banking interests involved, this learned judge from the outset expressed his dislike for the whole attempt in no uncertain terms.[91]

As is well known the compromise recognised by the Act puts the obligation upon the carrier to exercise due care in all that pertains to the storing and handling of the cargo. In return for this he is exempted from responsibility for loss or damage caused by the usual maritime perils from the incidence of which sea carriers have long protected themselves, and in particular from "act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in management of the ship."[92] In *Gosse Millard* v. *Canadian Government Merchant Marine*[93] during some repairs to the hatches of a ship the covers were negligently not replaced so that during a storm of rain the cargo was damaged. In the view of Wright, J., who tried the case, this was negligence not in the management of the ship but in the custody of the cargo, and he held the carrier liable. The spear head of the attack which reversed this judgment (Greer, L.J., dissenting) was certainly Scrutton, L.J. and his argument well repays attention. First of all he rejects a plea for harmony between this country and other countries in the interpretation of what is, after all, an international convention by quoting and relying upon the very insular remarks of Lord Esher, M.R., in *Svendsen* v. *Wallace*[94] where he scoffs at the idea of making the law of "the greatest commercial and maritime country in the world bend to the law of other countries whose commercial operations are far less extensive, and where commercial adventure is far more timid." He then[95] accuses the Courts of the United States with having "approached shipping matters from the point of view of the cargo owners," because that country has not been a shipowning country and indicates that in his view most of the U.S. decisions on the subject of management are wrong. Was he oblivious of the fact that in his own judgment he was striking a blow in the interests of the shipowners? His view,

[90] 14 & 15 Geo. V, c. 22.

[91] See his evidence before the Joint Committee on the Hague Rules, and also the preface to the eleventh edition of Scrutton on *Charter-parties*, where the interpretation of the Act is referred to as a "terrifying prospect."

[92] Art. IV, 22 (*a*).

[93] [1929] A.C. 223 H.L.

[94] (1884), 13 Q.B.D. 69 at 72.

[95] p. 732.

if accepted, would of course have driven the proverbial carriage and pair through the statute, and either dragged foreign courts at the carriage tail of "the greatest commercial and maritime country," or led to a divergence which would have deprived the international compromise effected at The Hague of most of its meaning.

In the House of Lords much more respect was paid to the objects of this legislation. Lord Sumner, for example, was very much alive to the object of Scrutton, L.J.'s judgment. He says "on this construction the obligation of Article III r. 2 to take care of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect."[96] In the result the House was unanimous in restoring the decision of Wright, J.

For my final topic I will choose an episode from the law of banking. The relationship of banker and customer, one of the most important in the commercial world, has received remarkably little scientific analysis, and indeed the cases which directly touch upon the subject are but few in number. Considering that banking in its modern form goes back to the time of the Parliamentary War, it is also curious that there are no cases at all until the nineteenth century.

Modern banking started when timorous people deposited their money and valuables with the goldsmiths. The transaction appears to have been regarded as one of bailment, and the relationship was pleaded on that basis until well into the nineteenth century.[97] But as soon as the question arose as to the responsibility of the banker for the money which he had received from his customer, and which, of course, he had been using to lend to others for some two hundred years, it was perceived that bailment afforded no sort of basis at all. It was then suggested that the relationship was one of agency, the banker being a sort of broker between those who have money to lend and those who wish to borrow. This was the business conception of the matter as appears from Gilbart's famous book on *The Principles and Practice of Banking*, where he describes the banker as "an intermediate party between the borrower and the lender."

In the early nineteenth century the conception of agency had hardly developed sufficiently to permit of the acceptance and

[96] 34 Com. Cas. 94 at p. 102.
[97] See the declaration in *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415.

development of the possibility, though it was undoubtedly the one which contained the most fertile seeds of progress. In *Devaynes* v. *Noble*[98] it was first held that the banker is a mere borrower from the customer. This view does not appear to have met with ready acceptance, for it was not finally established until 1848 in the famous case of *Foley* v. *Hill*,[99] where the agency basis was strongly argued for in order to try and establish that the banker was a trustee of his customer's money. Now this would of course have blown up the whole business, and the House came down heavily on the side of a debtor-creditor relationship.

But it is quite obvious that this is a thoroughly inadequate basis, and in the very case of *Foley* v. *Hill* special qualifications had to be introduced in respect of repayment against the customers' cheques. These the reporter attempted to summarise by a phrase not found in the speeches but which became famous, that of the "super-added obligation." Whenever it became necessary to lay down some new aspect of the banker's duty towards his customer it was found to exist by virtue of a "super-added obligation."

The duties of the banker are of course numerous and complicated. Apart from the obvious one of restoring the customer's money, none of them appear to follow either logically or otherwise from the debtor-creditor relationship. The banker must not, for example, disclose to any third party the state of the account, that is how much money he owes to his customer,[100] nor can he terminate the relationship by repaying the debt, he must give a reasonable notice,[101] he is responsible for collecting bills and cheques for his customer's account, and indeed has a number of other duties which it is simply not possible to infer from his position as debtor.

The absurdity of the situation was revealed in 1921 by the well-known case of *Joachimson* v. *Swiss Banking Corporation*.[102] Here in order to wind up a partnership a writ had been issued against the bank before any demand had been made for payment of the balance standing to the credit of the account. When the bank contended that they were entitled first to have a demand the obvious rejoinder was made that the debtor must seek his creditor, and pay without being asked. But this is absurd from the point of view of common sense and banking practice, yet it was accepted by the trial judge, logically applying the decision in *Foley* v. *Hill*.[103] In the Court of Appeal, however, a more

[98] (1816), 1 Merivale 625.
[99] 2 H.L.C. 14.
[100] *Tournier* v. *National Provincial Bank*, [1924] 1 K.B. 461.
[101] *Prosperity, Ltd.* v. *Lloyds Bank* (1923), 39 T.L.R. 372.
[102] [1921] 3 K.B. 112.
[103] *Supra.*

forward-looking attitude prevailed, and the majority of the Lords Justices were prepared to find another super-added obligation, that to make a demand on the banker for repayment before the money can become legally due.

To the mind of Atkin, L.J., however, this appeared a half-hearted and unsatisfactory method of dealing with a point which really involved the whole conception of the relationship between the parties. Precluded as it appeared by *Foley* v. *Hill*[104] from finding a basis in agency he cast about for some principle which would at any rate be more scientific and nearer to commercial reality than that of debtor and creditor, even though helped out with such super-added obligations as the Courts might infer. What he found to exist between the parties was a contractual relationship of a general character involving obligations on both sides of a somewhat extensive sort. The conception is unitary, and though no doubt the undertaking by the banker to borrow from the customer such sums as the latter may be ready to pay to him is an essential feature of it, it contains other obligations of very substantial importance, often only indirectly connected with the aspect of loan. The learned Lord Justice sets out a number of these in a passage of his judgment[105] which has naturally become of classical interest. This, however, does not profess to be complete, and is, for example, silent on the important duty of the banker to treat his customer's affairs as confidential, a matter which was to engage his attention three years later in *Tournier's Case*.[106] This obligation is of a fiduciary nature, and it appears first to have been discussed during the period when the agency aspect of the relationship was still in men's minds, that is in 1850, when in *Tassel* v. *Cooper*[107] a jury had found that a bank which had disclosed the accounts of a farm bailiff to his employer had acted in breach of duty. Many of the other duties existing between banker and customer are similar in character to those existing between a principal and his agent, and it appears to me that there is yet time to mould and simplify Lord Atkin's contract on these lines.

Technically, since his judgment was but one out of three in the Court of Appeal, Lord Atkin's conception of this relationship is no doubt not of binding validity, but it is in accordance with the march of events, and has been generally accepted by the text writers.

R. S. T. Chorley.

[104] *Ubi supra.*
[105] See p. 127.
[106] See *supra.*
[107] 9 C.B. 509.

STATUTES

The Courts (Emergency Powers) Act, 1939

In time of war many persons find difficulty in performing the contractual obligations assumed by them before, and often without any regard to the possibility of, the outbreak of war; it is the problem of giving such persons some measure of protection from their creditors which this Act, and other legislation dealing specifically with men serving in the armed forces, seeks to solve. The principle adopted, which was applied during the war of 1914 to 1918[1] is to place the remedies of creditors, whether judicial or by way of self-help, in the discretion of the Court, which can refuse the creditor to exercise his remedies if the debtor is unable to satisfy the debt or obligation as a result of the war.

The matters dealt with by the Act can be classified into the remedies generally available to judgment creditors, remedies against property, and insolvency and it is proposed to examine its provisions under these headings. The restriction on the rights of a judgment creditor is that he cannot proceed to execution on or otherwise to the enforcement of his judgment without first obtaining the leave of the Court. This provision applies to all judgments or orders for the payment of money whatever the cause of action may have been, subject to the following exceptions—

(*a*) Any judgment for damages for tort.

(*b*) Any judgment or order for the recovery of a debt which has become due by virtue of a contract made after the commencement of the Act.[2]

(*c*) Any judgment under which no money is payable otherwise than in respect of costs.

(*d*) Any order in a matter of bastardy or which is enforceable as an affiliation order.[3]

(*e*) Any order made in criminal proceedings or for the recovery of a penalty under a statute.

From these exceptions it would seem that the Act is generally concerned with contractual obligations but if this be so the omission from the exceptions of judgments for breach of trust and orders for maintenance or alimony is curious. The latter orders are in any event enforceable only with the consent of the Court.[4]

The exception relating to wartime contracts is limited to the recovery of debts due thereunder, and would not seem to apply to judgments for damages on any breach of contract other than a failure to pay money. That the scope of the exception is thus limited is borne out by the distinction between debts and other obligations maintained in the Act.[5] Unless the Courts hold that the exception applies generally to all actions for damages for breach of contract the anomalous position arises in which a defaulting vendor, but not a defaulting purchaser, is entitled to the benefit of the Act.

One other remedy, the right of a vendor to forfeit the deposit, may be mentioned in this connection; this cannot now be done without leave where the contract was entered into before the Act.

[1] The Courts (Emergency Powers) Acts, 1914 to 1916.

[2] 2nd September, 1939. Section 3 (*a*) brings within the Act cases where a binding option was given before but exercised after the Act.

[3] E.g. a maintenance order made in a Court of Summary Jurisdiction.

[4] *Campbell* v. *Campbell*, [1922], p. 187.

[5] See sections 1 (2) and (4).

The remedies against property affected by the Act are those generally available to landlords and mortgagees, but only the enforcement of pre-war contracts is affected.

Landlords must obtain the leave of the Court before levying a distress or re-entering upon property. Proceedings for possession can be instituted and prosecuted without any leave except in the case of proceedings based upon failure in the payment of rent where leave must be obtained before the judgment can be enforced.

The exercise by mortgagees of their remedies against the mortgaged property is restricted as follows—

(*a*) A receiver of the mortgaged property can only be appointed by a mortgagee after leave has been obtained from the Court, but the Act does not apply to the appointment of a receiver by the Court.

(*b*) A power of sale vested in the mortgagee only becomes exercisable after leave has been obtained. If the mortgagee wishes to obtain an order from the Court for sale or foreclosure then leave must be obtained before proceedings can be instituted, or, in the case of proceedings pending when the Act came into force, before any further step can be taken.

A mortgagee of land who was in possession of the mortgaged property before the Act came into operation or who had at that time appointed a receiver who was in possession of the property or the rents and profits thereof can sell without any leave being obtained. A mortgagee of property other than land can sell without leave if he was in possession thereof and his power of sale had arisen and notice of the intended sale had been given before the Act came into operation.[6]

(*c*) A mortgagee cannot take possession of the mortgaged property without the leave of the Court, but proceedings for possession can be instituted and prosecuted without leave except that a judgment for possession under a mortgage of land in default of the payment of any money due under the mortgage can only be enforced after leave has been obtained.[7]

It is in connection with mortgages that non-compliance with the Act assumes importance for third parties. The Act does not provide any sanction for the contravention of its provisions, so that the general rule that an act done in breach of a statute is illegal and void[8] is applicable. There is no provision enabling a debtor to waive his rights under the Act, but such waivers were recognised as being valid and effective under the Act of 1914 on the ground that the Act is for the protection of individuals and not of the community generally.[9]

The results of a sale by a mortgagee without the requisite leave under the Act of 1914 were considered in *Anchor Trust Co.* v. *Bell*.[10] In this case the mortgagor commenced proceedings for redemption, the vendor mortgagee and the purchasers from him being defendants in the action. Lawrence, J., held that the purchasers had acquired only the rights of the mortgagee on the ground that they were affected by notice of the irregularities.

This decision is equally applicable to cases arising under the present

[6] There are no provisions as to how and upon whom notice is to be served.
[7] Section 1 (3) as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939.
[8] *Re Mahoud and Ispahani* (1921), 2 K.B. 716.
[9] *Re Sandow*, [1916] W.N. 262.
[10] (1926) Ch. 805.

Act, although section 104 (2) of the Law of Property Act, 1925, may affect the position where mortgages made after 1925 are concerned. This provides that a purchaser's title shall not be impeached on the ground that the consent of the Court, when so required has not been obtained, but the corresponding section of the Conveyancing Act, 1881, which did not provide any protection in this specific instance, did not assist a purchaser with notice.[11]

The Act does not affect the commencement of proceedings in bankruptcy or for winding up unless these are based on non-compliance with a bankruptcy notice or a demand under section 169 of the Companies Act, 1929, or are based on a judgment to which the Act applies. But whatever the claims of the creditors may be and whenever they arose the Court has a general power to stay the proceedings if the debtor's failure to meet his obligations was brought about by the war.

To turn to the Court's powers under the Act; these only arise in cases where the debtor satisfies the Court that his inability immediately to pay the debt or perform the obligation in question arose by reason of circumstances directly or indirectly attributable to any war in which His Majesty is engaged. When this is established the Court can refuse leave to exercise the right or remedy or give leave subject to restrictions or conditions.

The Act of 1914 produced little case law which is of assistance in the working of the present Act and, except in the case of *A*. v. *B*,[13] which was considered by the full Court of Appeal, the Judges have tended to confine their reported judgments to the particular facts before them on applications under the Act. The only statement of any general discretion relates to mortgages,[14] but is of no assistance in the constant stream of applications by building societies to which an effective solution can only be supplied by further legislation interfering with the contractual rights of the parties.

The meaning of the words "inability to pay" was considered in *A* v. *B*.[13] In the application before the Court the debtor company had tendered evidence of the disastrous results that the enforcement of the plaintiff's judgment would have upon the interests of its other creditors and shareholders, but not of its inability to satisfy the plaintiff's claim without regard to its other liabilities. The Court held that this was not sufficient to bring the debtor within the Act. The judgment of the Court which was delivered by Green, M.R., contains a number of statements of principle, which are not altogether easy to apply. On the one hand it was stressed that the word "inability" must be construed in a reasonable fashion so that it is not necessary for the debtor to show a complete lack of available money with which to satisfy the claim, and, on the other, that although the claims of other creditors may be considered, the debtors' inability immediately to satisfy all claims is insufficient, as the Act should not be used as a form of bankruptcy administration.

To pass to the exercise of the discretion conferred by the Act there is little that can be added to the statement of Goddard, L.J.,[15] that the Court "is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do

[11] *Bailey* v. *Barnes* (1894), 1 Ch. 25.
[12] Law of Property Act, 1925, section 104 (2).
[13] [1939] 4 All E. Rep. 169.
[14] *Re Jobson's Application*, 34 T.L.R. 184.
[15] *Metropolitan Property Company* v. *Purdy*, [1940] 1 All E.R., p. 191.

the best he can in the circumstances . . . having no rules of law to guide him."

Some doubt has been thrown on the general impression that the Court's powers are limited to the grant of a complete or partial moratorium by the remarks of Mackinnon, L.J., in *Blanket* v. *Palmer*.[16] The learned Lord Justice, while refraining from expressing any opinion on the point, remarked that: "So wide and so vague are the terms of the Act that my present impression is that it is quite conceivable that it might be within the powers of the Court to order almost anything in variation or in defiance of the existing contractual obligations of the parties."

If this liberal view is ultimately established the comparatively stringent conditions which must be complied with before the Act can become operative may often prove a stumbling block in many cases in which the Court could usefully intervene.

[16] [1940] 1 All E.R. 524 at p. 526. R. L. Robinson

The Prize Act, 1939[1]

It is, it could be maintained, a striking tribute to the peaceful intentions of this country that the outbreak of the present war should find its enactments relating to prize in a state of chaos. But this chaos is most puzzling and most wearisome to the lawyer who seeks his way among these enactments. Of the fifty-three effective sections of the chief of them, the Naval Prize Act, 1864,[2] one was repealed in 1894, and seventeen in 1914; in the latter year, also, amendments were made to two sections. And now the Prize Act of 1939 adds an additional section, amends nine others, and declares twelve more inapplicable in a certain class of cases. Clearly a reprint is desirable.

The main purpose of the Act of 1939 is to provide, as it does by section 1 (1), that "the law relating to prize shall apply in relation to aircraft and goods carried therein as it does in relation to ships and goods carried therein, and shall so apply notwithstanding that the aircraft is on or over land." Section 1 (2) provides that the amendments necessary for giving effect to this purpose, which are contained in Part I of the Schedule to the Act, shall be made in the Act of 1864, the Prize Courts (Procedure) Act, 1914,[3] and the Prize Courts Act, 1915.[4] For the most part these amendments are purely consequential. Thus definitions of the terms "aircraft papers" and "any of His Majesty's military aircraft" are added to the definition section (section 2) of the Act of 1864. Similarly it is provided that the sections of the latter Act relating to the custody of prize ships,[5] and the bringing in of their papers,[6] shall be amended so as to apply also to the custody of prize aircraft and the bringing in of aircraft papers. The section applying these provisions *mutatis mutandis* to prize goods[7] is likewise amended to the same effect. Again, the provisions governing prize salvage[8] and the application of Customs regulations to prize ships[9] are extended so as to embrace aircraft within their terms. A new section

[1] 2 & 3 Geo. VI, c. 65.
[2] 27 & 28 Vict., c. 25.
[3] 4 & 5 Geo. V, c. 13.
[4] 5 & 6 Geo. V, c. 57.
[5] 27 & 28 Vict., c. 25, s. 16.
[6] *Ibid.*, s. 17.
[7] *Ibid.*, s. 31.
[8] *Ibid.*, ss. 40 and 41.
[9] *Ibid.*, s. 47.

(section 48A) is introduced to regulate the making of Customs declarations by captors of prize aircraft. Equivalent adjustments are made in the provisions of the Act of 1864 defining the interests of captors in prizes;[10] in section 1 of the Prize Courts (Procedure) Act, 1914 (the chief effect of which is to enact that ships of war—and now military aircraft—taken as prize need not be delivered into the custody of the Marshal); and in section 3 of the Prize Courts Act, 1915, which deals with the power of the Court to transfer the *res* from the custody of an inferior court to that of its own Marshal.

But in one case this irritating process of consequential amendment would appear to have far-reaching—and perhaps unlooked-for—results. Section 2 of the Act of 1864 defines the term "Officers and Crew" as including "Flag Officers, Commanders, and other Officers, Engineers, Seamen, Marines, and others on board any of Her Majesty's Ships of War." After amendment this definition reads: "Flag Officers (etc. to:) Soldiers, airmen and others on board any of His Majesty's Ships of War *or any of His Majesty's military aircraft.*" Now the expression "Officers and Crew" appears but thrice in the sections of the Act which remain unrepealed. It appears in section 39, where it is provided that a prize taken by "any of the Officers and Crew of a Ship other than a Ship of War of Her Majesty" shall be a droit of Admiralty. There the use of the term is obviously untechnical. But it appears again in sections 42 and 43, which relate to the grant of prize bounty. There again the term is employed somewhat imprecisely, it being enacted that "If, in relation to any War, Her Majesty is pleased to declare . . . Her Intention to grant Prize Bounty to *the Officers and Crew of Her Ships of War*" such officers and crew as are present at the engagement shall be entitled among them to a bounty of £5 per man aboard an enemy armed ship taken or destroyed.[11] Likewise section 55 (1) lays down that nothing in the Act shall give to "*the Officers and Crew of any of Her Majesty's Ships of War*" any interest in any prize other than is granted by the Crown. Although "any of Her Majesty's Ships of War" is also a *terminus technicus* and does not include "any of His Majesty's military aircraft" which are separately defined by section 2 (as amended), it is nevertheless arguable that, in view of the amendment to the definition of "Officers and Crew," the crews of aircraft are also entitled to share in prize bounty.

This is one of the few general problems raised by the Act. In connection with it, it is to be noticed that sections 42 and 43 are among those sections of the Act of 1864 which are contained in Part II of the Schedule to the Act of 1939. Such sections are declared, by section 1 (3) of the latter Act, not to apply "in relation to *aircraft* or goods carried therein *taken as prize.*" It is thus clear that no prize bounty can be claimed in respect of an enemy military aircraft which is taken or destroyed. This is not serious for the sailor, for the £25 available for bringing down a bomber with a crew of five would not go far among a destroyer's crew of one hundred and fifty. But is the bomber's crew of five entitled to the windfall of £150 apiece which the sinking of an enemy destroyer would bring them? The Act gives little help in the question, and presumably it must remain unsolved until a grant of prize bounty is made and until a sea lawyer is found among the ranks of British airmen. It was held in *The Konigsberg*,[12]

[10] *Ibid.*, s. 55 (1).
[11] S. 42; the same term is used consequentially in s. 43.
[12] 3 B. & C., P.C., 135.

a prize bounty claim of the last war, that, where an enemy cruiser was destroyed by naval vessels assisted by aircraft piloted by members of the Royal Naval Air Service, the latter were entitled to share in the bounty earned. But that decision is not of much assistance, as the aircraft were specially detailed to aid the naval vessels and the names of their personnel were borne on the ships' books. If the problem here involved should ever come up for decision, there would have to be borne in mind the solemn words of Lord Stowell: "Head-money is not property acquired in any manner by the Captor, or to be demanded on the ground of any antecedent title; it is a mere voluntary grant of public money, and the grantees must be content to take what is actually given and no more. The Court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the legislature for a supposed omission and arrogating to itself the further disposal of public money. By every rule of interpretation that can apply to such a matter the Court is bound to confine its exposition within the very letter of the Statute, if that letter speaks an intelligible language."[13] Yet it may be that the letter of the statute speaks no intelligible language here.

The remaining sections excluded from application in relation to aircraft taken as prize deal with capture by land expeditions,[14] conjunct captures with allies,[15] pre-emption,[16] powers of the Prize Court in cases of irregular captures,[17] ransom, convoy,[18] and the regulation of Customs declarations by Captors;[19] the exclusion of this last section was unnecessary as aircraft were already separately provided for in this matter by the new section, section 48A. Finally, the operation of section 30 was excluded, and this raises another interesting point.

Section 30 provides that captors may include as many as six "small armed ships" in one adjudication. It obviously does not apply to aircraft for an "armed ship," though not defined by the Act of 1864, is defined by the Prize Court Rules, 1939,[20] as falling within the scope of the term "Ship of War" which, as has already been seen, does not include aircraft. Nevertheless, the exclusion of section 30 does raise the question as to whether enemy military aircraft are the subject of prize jurisdiction. It is not entirely settled that captured enemy warships are prize, but section 30 clearly contemplates proceedings for their condemnation. The same are contemplated equally by the Prize Court Rules, since a form of condemnation is provided.[21] And indeed, there are numerous reported decisions of proceedings in prize affecting enemy warships. But for the most part such proceedings are taken solely for the assessment of prize bounty.[22] It is not clear whether warships fall within the rule "All Prize must be judged," though it is expressly enacted that there is no need for them to be delivered up to the Marshal.[23] Nevertheless, the general impression conveyed by section 30 and various other provisions of the Act of 1864 is that warships

[13] *La Bellone*, 2 Dods, 343, 348.
[14] S. 34.
[15] S. 35.
[16] S. 38.
[17] Ss. 37 and 39.
[18] S. 46.
[19] S. 48.
[20] Order I.
[21] Appendix A, No. 53 (v) and (xxv) to (xxviii).
[22] Cf. Pearce Higgins in VI B.Y.I.L. (1925), 103, 108.
[23] 4 & 5 Geo. V, c. 13, s. 1 (1), replacing s. 22 of the Act of 1864.

are at least capable of condemnation. In the case of enemy military aircraft taken as prize, the Act of 1939 provides likewise that they need not be delivered up to the Marshal. But the Prize Court Rules provide a form of condemnation.[24] Since the application of sections 42 and 43 is excluded in relation to them, there can, however, be no question of prize bounty where enemy military aircraft are taken or destroyed. Thus the impression is created that there is an obligation on the captors to bring in enemy military aircraft or their papers for adjudication.

It is apprehended that this is a correct interpretation of the Prize Court Rules and of the various enactments and authorities. But, if this be so, the result would be ludicrous. For it would mean that there would have to be prize proceedings in respect of every enemy aircraft captured or brought down! And, since no amendment has been made to section 30 of the Act of 1864 so as to extend its application to aircraft, there would have to be separate proceedings in respect of each aircraft. A respectable air-raid would overwhelm the Court with business! It should in fairness be added that prize proceedings are appropriate only where an aircraft is *taken as prize*,[25] and that crashing or shooting down by land defence guns (as distinct from ships' guns) would presumably not constitute a taking as prize. That notwithstanding, the doubt is substantial enough to strengthen very considerably the case for the reduction of the Prize Acts to some semblance of order.

The rest of the provisions of the Act of 1939 do not raise so many problems, though it may be suspected that some serious difficulties lie hidden behind the seemingly innocent words of section 3. That section declares "for the removal of doubts" that Colonial Courts of Admiralty (i.e. Courts in any British possession of unlimited civil jurisdiction which were invested with Admiralty jurisdiction by section 2 of the Colonial Courts of Admiralty Act, 1899[26]), Admiralty Courts set up outside British territory under section 12 of the Act of 1890, and Vice-Admiralty Courts set up under section 2 of the Prize Courts Act, 1894,[27] shall be Prize Courts within the meaning of the Act of 1864.

By section 2 the powers of the Crown or the Admiralty to commission or regulate the procedure of Prize Courts, which is derived from section 2 (1) of the Prize Courts Act, 1894, are extended. Such powers are now exercisable not only within British possessions, but also in any British protectorate, in any United Kingdom, Australian or New Zealand mandate, and in any other country where the Crown has for the time being jurisdiction in prize. This extension of powers has already been taken advantage of for the purpose of establishing Prize Courts in the Palestine mandate[28] and in the protectorates of Zanzibar[29] and North Borneo.[30]

Finally, section 4 (1) defines the countries and territories to which the Act of 1939 applies. These are (*a*) the United Kingdom, the Channel Islands and the Isle of Man, (*b*) Australia and New Zealand, (*c*) British India and Burma, (*d*) Newfoundland and every colony, (*e*) every British protectorate, (*f*) United Kingdom, Australian and New Zealand mandates, and (*g*) every other country wherein the Crown has for the time

[24] Appendix A, No. 53 (v).
[25] Cf. s. 16 of the Act of 1864.
[26] 53 & 54 Vict., c. 27.
[27] 57 & 58 Vict., c. 39.
[28] S.R. & O., 1939, No. 1137.
[29] *Ibid.*, No. 1136.
[30] *Ibid.*, No. 1138.

being jurisdiction in prize. To facilitate the application of the Act in protectorates, mandates and countries where the Crown has extra-territorial jurisdiction, the operation of the various enactments amended is likewise extended so as to include those places. The Act does not, it will be noticed, apply to Canada. But the Order bringing into force the new Prize Court Rules,[31] Canada having requested and consented to its making, applies thereto, but only to the extent that it revokes the Prize Court Rules of 1914.

By way of summary it may be said that the Act of 1939 has not produced, or at least was not intended to produce, vital changes in the law relating to prize. It is an enactment extraordinarily difficult to read and provides a striking demonstration of the danger and inconvenience of the pernicious practice of incorporation by reference.

[31] P.R. & O., dated 2nd September, 1939.

CLIVE PARRY.

NOTES OF CASES

Wages During Illness

In *Marrison* v. *Bell*, [1939] 1 All E.R. 745, annotated in 3 Mod. L.R. 162, it was decided that receipt of sickness benefit under the National Health Insurance Act, as distinct from receipt of compensation under the Workmen's Compensation Act, did not destroy the right to wages during illness. Not unnaturally this decision was believed to establish a right to wages during illness. This alarmed employers to such an extent that two test-actions were soon brought and in these decisions this belief has been declared fallacious. In the first action, *Petrie* v. *MacFisheries, Ltd.*, [1939] 56 T.L.R. 119, the case of the workman seemed to be even stronger than in *Marrison* v. *Bell* as he had not received any statutory payments but only half wages for twenty-one days paid as an act of grace in accordance with a practice communicated to the employees by notice. It could not be proved that the plaintiff had ever seen this notice, but it was not disputed that he was aware of the practice. On these facts it was held impossible to imply a term providing for full payment of wages during illness. The Court emphatically denied that a claim for wages could be founded on common law apart from contract. Nor had any such common law right been established by the decision in *Marrison* v. *Bell*. This case only dealt with the effect of statutory payments on the right to wages assuming the parties had agreed that wages should be payable during illness.

It may be doubted whether the plaintiff's knowledge of the practice of the defendants could fairly be construed as consent and also whether the Court in *Marrison* v. *Bell* conceived the right to wages as only founded on contract. It must, however, be admitted that in that case it was not necessary to determine the character of that right and that an attempt to found it on common law would have been a departure from former ideas and would have required qualifications in contracts which cannot reasonably be said to carry a right to wages during illness and in cases, such as those of agricultural labourers, where such a right is precluded by custom. By falling back on implied terms, however, the problem has been evaded rather than solved. The parties may not have thought about it at all and, as in other questions depending on implied intentions, the Court exercises a discretion in finding what the parties may be taken to have intended.

Is it to be presumed that it is intended to pay wages during illness or is the presumption the other way round? The answer is given by Atkinson, J., who points out that the County Court Judge in *Marrison* v. *Bell* had been wrong in laying down the rule "When off sick, in the absence of any express contract, no wages due" and that "the truer view was just the other way round." Similarly, du Parcq, L.J., states that in the absence of any indications to the contrary "it may be assumed that he is to be paid, and that it was the intention of the parties that he should be paid."

In spite of this benevolent presumption of the intention of the parties the present law is not satisfactory if the social justice of the claim to wages during illness be admitted since the presumption is easily rebutted, for instance, by unilateral "acts of grace" as in the present case. The doctrine of the implied term is derived from the notion of freedom of contract and presupposes, therefore, a degree of equality of bargaining

strength which is absent from the relation of master and servant. Like many other incidents of that relation the problem of wages during illness calls for statutory regulation.

After the claim to wages during illness had been reduced from its supposed common law basis to the much more insecure foundation of a presumption of fact, the decision in *Hancock* v. *B.S.A. Tools, Ltd.*, [1939] 4 All E.R. 538, seems to go even further and to exclude piece-workers from the operation of the presumption.

The decision can be satisfactorily explained on the ground that the evidence had established a custom in the particular trade preventing any claim for wages during illness. But Atkinson, J., whose judgment is best understood by reading it together with his judgment in the Court of Appeal in *Petrie* v. *MacFisheries, Ltd.*, adopts a broader ground which does not confine the rule laid down to the particular trade but extends its application to piece-work in general. Following the test laid down in *Smith's Leading Cases*, Vol. 2, p. 49, he distinguishes contracts where the consideration for wages is the actual performance of the work and contracts where the mere readiness and willingness to perform it, if of ability to do so, constitutes the consideration. This test appears to be open to the following objections—

In the first place, it has led the learned authors of *Smith's Leading Cases* to deny the right to receive wages during illness if the servant has received payments under the National Health Insurance Acts. This question has of course been settled differently in *Marrison* v. *Bell*.

Secondly, it treats the claim to wages during illness as dependent on the presence or absence of consideration, whereas the majority of the Courts in *Petrie's* case considered that it must depend solely on the presence or absence of an implied term, that is to say a promise by the master, without any doubt that such a promise if given might be unenforceable being unsupported by consideration.

Thirdly, it postulates that the consideration for wages is either work or readiness to work, whereas it would seem that the consideration for the promise to pay wages is the promise to serve. The difference between piece-work contracts and other contracts of employment lies not in the nature of the consideration provided by the servant but in the method of calculating the wages. Only this view, it is submitted, can explain the right of piece-workers to sue for wrongful dismissal or for failure to provide work (*Devonald* v. *Rosser & Sons*, [1906] 2 K.B. 728). In *Smith's Leading Cases* and in the judgment of Atkinson, J., a *dictum* by Greer, J., is quoted stating that the consideration for work is wages and the consideration for wages is work. But in that case—*Browning* v. *Crumlin Valley Collieries*, [1926] 1 K.B. 522—the master succeeded, not on the ground that no work had been done, but on the ground that through no fault of his no work could be done. The facts of the case and the context show that in that case Greer, J., was not speaking of consideration in the technical sense.

The judgment of Atkinson, J., in the present case is objected to not only because it fails to analyse correctly the contract of employment but because it invites dangerous generalisations denying wages during illness in piece-work contracts. It is submitted that the fact that wages are calculated in any particular manner, as by reference to the amount of work actually done or the time actually spent at work, does not of itself compel the conclusion that they are not payable during illness.

J. UNGER.

Nuisance, Negligence and the Overlapping of Torts

In the first number of this REVIEW the present writer has suggested that, in regard to a group of important torts, notably the actions for Negligence (with all its ramifications, such as liability for dangerous things), those of so-called strict liability (*Rylands* v. *Fletcher*, fire, animals) and Nuisance, the traditional analytical distinctions have lost much if not all of their former importance, that these torts frequently overlap and rationalisation seemed desirable. Subsequent judicial developments appear to lend point to this suggestion. In at least one recent case it is almost impossible to see whether the Court was examining the action under *Rylands* v. *Fletcher* or under Negligence (*Hanson* v. *Wearmouth Coal Co.* (55 T. L.R. 747), whereas in other cases the Courts had to resist attempts to plead exactly the same facts supported by identical arguments, first in Nuisance, then in Negligence. Practitioners and teachers of law are bound to feel increasing difficulty in maintaining distinctions which have lost most of their legal as well as of their social significance.

The basic difficulty appears to result from the fact that the modern judicial tests for negligent conduct and strict liability are, under the pressure of modern social and industrial developments, substantially the same. The problem is raised afresh, but not solved in the important decision of the Court of Appeal in *Wringe* v. *Cohen* (56 T.L.R. 101). The most careful study of the judgment which Atkinson, J., delivered for the Court, will only increase the doubt, in the mind of the reader, what, if any difference, there is between negligent conduct and strict liability, and, consequently, make it difficult to decide whether Nuisance demands proof of negligent conduct or not.

The plaintiff was the owner of a lock-up shop, and the defendant the owner of the adjoining house, the groundfloor of which was used as a shop. The house was considerably higher than the plaintiff's shop. The wall of the defendant's house, constituting the gable-end next to and above the plaintiff's shop, fell on and destroyed the roof of the shop. There was evidence that the pointing of the gable-end was very bad, the collaring perished, and the wall bulging, and that the wall had been in this defective state for three years. The defendant admitted that he was liable for repairs, by agreement with his tenant. A builder gave evidence that two years ago the defendant had asked him to look at the gable-end and that it looked in a fair state of repair then. Apart from that the defendant had done nothing, he had not himself examined or even looked at the defective parts.

The trial judge held that the wall was in a defective condition and a nuisance owing to the want of repair, that the defendant, being liable to repair, was under an absolute duty towards the plaintiff to keep his house in such repair that it did not become a nuisance, and awarded damages. The defendant appealed and contended that he would be liable only if it were found as a fact that he knew or ought to have known of the want of repair; that the judge did not so find, and the case ought therefore to be sent back for a new trial.

The Court of Appeal dismissed the Appeal (giving leave, however, to appeal to the House of Lords), and Atkinson, J., delivered a judgment for the Court which must be examined carefully.

After an examination of some earlier cases, which give little enlightenment either because they do not clearly state any principle, or because

reports are conflicting (*Pretty* v. *Bickmore* (8 L.R.C.P. 401),[1] Atkinson, J., mainly dealt with *Tarry* v. *Ashton* (1 Q.B.D. 314), and the more modern cases of *Barker* v. *Herbert* (1911), 2 K.B. 633), *Noble* v. *Harrison* (1926), 2 K.B. 332, *St. Anne's Well Brewery Co.* v. *Roberts* (44 T.L.R. 703), and *Wilchick* v. *Marks* (1934), 2 K.B. 56. All of these decisions Atkinson J., in the name of the Court, attempted to interpret as either expressly stating or reconcilable with the view adopted by the Court in the present case: that, if premises become dangerous as the result of something done by the occupier and cause damage, he is liable, although he did not know of the danger and was not negligent in not knowing. On the other hand, if premises become dangerous, not by the occupier's act nor neglect of duty, but as the result of the act of a third party or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it.

It is submitted, with great respect—

1. that the case could and should have been decided on the ground of negligent commission of nuisance, which would have relieved the Court of its legal difficulties;

2. that the authorities discussed do not warrant the conclusions which Atkinson, J., drew from them;

3. that at least two important decisions binding upon the Court were not referred to;

4. that the legal proposition as formulated at the end of the decision is contradictory in itself.

1. The facts as found by the County Court Judge revealed that the defendant had done nothing more than to ask a builder, two years before, to look at the gable-end, when it appeared to the builder to be in a fair state of repair. Apparently the wall, which had been bulging for three years and the collapse of which caused the damage had never been examined within the last three years. Could there be clearer evidence of a breach of duty, of an omission of a repair the want of which the defendant knew or ought to have known? Most of the recent decisions on Nuisance actually came to the conclusion that the defendant, in the circumstances of the case, was not negligent, and therefore non-suited the plaintiff. But in *Wilchik* v. *Marks* (1934), 2 K.B. 56, Goddard, J., held the defendant liable for a defective shutter falling upon the plaintiff, when he had not, as the defendant in the present case, a duty to repair, but merely a right to inspect the premises. Accordingly the action should have succeeded either on Negligence or on Nuisance committed negligently. There was no need to send the case back for a new trial, since the facts were clear and sufficient to support judgment. That in every such case the plaintiff now has a choice between suing in Nuisance or Negligence, is confirmed by the concluding words in Mackinnon, L.J.'s, judgment in *Sedleigh-Denfield* v. *St. Joseph Society for Foreign Missions* (1939), A.E.R. 725. It is one instance of the overlapping of torts which modern developments has produced.

2. One need not subscribe to all the tenets of the American Realist school of Jurisprudence to be convinced that a modern Court often interprets precedents in such a way as to confirm a desired conclusion. This can be done by a selection of precedents as well as by relegating parts of judgments to dicta, or, on the other hand, lifting dicta, to integral parts of a judgment. If such liberty had not been exercised by the Courts in recent years, the

[1] Cf. 56 L.Q.R. 2.

law probably could not have developed judicially, as it has, and if there are lawyers who, for the sake of tradition, consistency and the sanctity of an analytical interpretation of the law, protest against such a view of legal evolution, they might reflect that the only alternative would have been a much more sweeping use of the legislative machinery, with the result that the Law Courts would have been entirely displaced from their time-honoured function of making new law while professing to apply the old one. It must, however, be pointed out that the interpretation of precedents by Atkinson, J., in the present case, seems to be a particularly strained one. It is true that *Tarry* v. *Ashton* lends itself to different interpretations. It is usually quoted in textbooks as an instance of cases in which, contrary to the rule, the master is liable for negligent conduct of an independent contractor. That rule, it is said, does not apply to acts on the highway.[2] It has, however, been suggested before[3] that the alleged rule of non-liability for independent contractors is a myth, surviving from former times. Were it otherwise, essential principles of liability would be stultified, which have been developed under the pressure of social conditions. The more the law of Tort emphasises the principle of responsibility for a *risque créé*, as part of the responsibility a manufacturer or a business man undertakes when he starts an enterprise likely to affect the public, the less application there is for the special rule about independent contractors. I do not know of any case, in recent years, when liability for a tort committed by an independent contractor has not been affirmed, under one or the other exceptions, such as extra-hazardous acts, duties imposed by statute, while in *Matania* v. *National Provincial Bank* (1936), A.E.R. 633, the Court of Appeal went so far as to make the principal liable for an ordinary nuisance committed by a contractor and incidental to the performance of his job. In the present case, Atkinson, J., attempted to interpret Blackburn, J., as having held that liability of the occupier was really absolute. It must be admitted that the judgment of that very eminent judge in this case has not the clarity characteristic of Blackburn, J. He obviously hesitated about the principle and was anxious to confine his judgment to the facts before him. But to read into it the interpretation which Atkinson, J., gave it, appears very difficult indeed. One passage in Blackburn, J.'s, judgment runs: "If he did investigate, and there was a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would be clearly answerable for the consequences." To the significance of the "latent defect" which the Court, in the present case, attempted to reconcile within its general statement that the duty is absolute, we shall have to refer later.

To the present writer it seems difficult, if not impossible, to interpret the decisions of *Barker* v. *Herbert* (1911), 2 K.B. 633, *Pritchard* v. *Preto* (1917), 2 K.B. 173, *Noble* v. *Harrison* (1926), 2 K.B. 332, and *St. Anne's Well Brewery Co.* v. *Roberts* (44 T.L.R. 703) as saying anything but that liability depends on whether the occupier or owner, as the case may be, knew or ought to have known of the defect. That this should be the law, is also Professor Winfield's view (56 L.Q.R. 3). *Barker* v. *Herbert* was clearly decided on the ground that the defendant neither knew, nor, owing to the short interval, ought to have known of the removal of a rail which caused the nuisance. The appellant had contended that the defendant's duty was

[2] Cf. Salmond, 9th edition, sec. 31, 75.
[3] Chapman, 50 L.Q.R., Friedmann, 1 M.L.R.

absolute. As Atkinson, J., states himself, the three Lord Justices agreed in holding that the occupier was not liable if the dangerous state of the premises was due to the act of a trespasser, and not to any default of the occupier or those for whom he was responsible, unless he neglected to abate the danger for an undue time after he became or ought to have become aware of it. They denied in unmistakable terms the absolute duty contended for. Substantially the same proposition was repeated in *Pritchard* v. *Preto*. In *Noble* v. *Harrison* the defendant was held not liable for the damage caused by the fall of a tree branch due to a latent defect not discoverable by reasonably careful inspection. Both Rowlatt and Wright, JJ., stated the liability of an occupier in the clearest possible terms, as arising (1) "if he causes it, (2) if by the neglect of some duty he allows it to arise, (3) if, when it has arisen without his own act and default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it." In *St. Anne's Well Brewery's* case the defendants, as owners, were held not liable, for exactly the same reason, and to this perfectly clear line of authorities ought to be added two further decisions of the Court of Appeal, *Job Edwards* v. *Birmingham Navigation Co.* (1924), 1 K.B. 341, and *Sedleigh-Denfield* v. *St. Joseph Society for Foreign Missions* (1939), 1 A.E.R. 725 (C.A.).

In the former case the defendant's liability for the nuisance caused by a burning refuse heap was denied because they neither knew nor ought to have known of it, and it should be emphasised that Scrutton, L.J., who dissented, did not dissent on the principle, which indeed he reaffirmed in *St. Anne's Well Brewery's* case, but merely on the extent of the defendant's duty to look after their property. In the latter case the Court denied the liability of a landowner on whose property a County Council had laid insufficiently protected pipes the blocking of which caused a flood. There are, then, no fewer than four decisions of the Court of Appeal, binding, at least according to the prevalent opinion[4] upon itself, which clearly state a principle contrary to that formulated in the present case. On the other hand, *Tarry* v. *Ashton* gives no more than doubtful support.

Nor would the result be different if we distinguished between cases of public and private nuisance. The distinction seems tacitly to have been given up, for the present case was undoubtedly one of private nuisance, and so were *St. Anne's Well Brewery's*, *Job Edward's*, and *Sedleigh-Denfield's* cases. On the other hand, *Tarry* v. *Ashton*, *Barker* v. *Herbert*, *Noble* v. *Harrison* were undoubtedly cases of public nuisance. As for *Wilchick* v. *Marks* (1934), 2 K.B. 56, where a passer-by was injured by a shutter falling from the defendant's house, the present writer has never been able to find out whether it was decided as a case of public nuisance or under the rule of *Donoghue* v. *Stevenson*. The duty was derived from proximity, but textbooks appear to treat it as a case of nuisance,[5] and that is further evidence for the proposition that the actions are now practically interchangeable. As for the distinction between private and public nuisances, there is no reason why it should be of any juristic significance in the law of tort, which always presupposes that damage has been caused to the plaintiff by a nuisance caused by the defendant. In the one case the breach of duty is towards the plaintiff as a member of the public entitled to use the highway, in the other towards the occupier of neighbouring property. If ever there was a difference in the standard of these two duties, the Courts have

[4] Cf. 3 M.L.R. 66.
[5] But cf. the reference in Salmond, 9th edition, p. 251.

certainly given it up, as the previously discussed cases show. This bears out Professor Winfield's contention that damage caused by public nuisance is a case of private nuisance.[6]

4. The Court limited its proposition of the absolute liability of the occupier by the qualifying statement that there was no liability if the danger resulted from the act of a third party or a latent defect. As for the act of a third party, this is something outside the control of the defendant, and such act excludes liability in every tort, strict or otherwise (*Donoghue* v. *Stevenson*, *Rylands* v. *Fletcher*, Nuisance, Animals, etc.). But the exclusion of liability in case of a latent defect virtually deprives the main proposition of its significance. For it can hardly be imagined that any damage caused neither by the act of a third person nor by a latent defect could be due to anything but knowledge or negligence of the occupier. All the cases quoted by the Court are thus explained. In *Barker* v. *Herbert* it was the act of a stranger, in *Pritchard* v. *Preto*, *Noble* v. *Harrison*, *St. Anne's Well Brewery's* case the latency of the defect which absolved the defendant, and the only doubt could arise from *Job Edwards'* case, which the Court did not refer to. Even there it was the act of a stranger which caused the nuisance, but Scrutton, L.J., rightly dissented from the majority in thinking that the occupiers ought to have taken notice of a big fire which had been smouldering for some time.

The present decision can thus hardly be said to have contributed to a clarification of the problem of liability in Nuisance. But, it is submitted, the problem is incapable of solution, as long as a distinction between strict and non-strict liability is preserved which modern social developments have made meaningless. These developments are fully reflected in the law, except that the last step of co-ordinating the various torts in a common principle, infinitely desirable for the practice as well as the learning of the law, has not been taken. It would seem to be easy to unite this group of torts, comprising probably Negligence, Trespass on and off the Highway, Statutory Duties, Nuisance, *Rylands* v. *Fletcher*, Liability for animals (except for cattle trespass), for fire, and the various aspects of liability for dangerous things or premises, under a common formula. *Rylands* v. *Fletcher* could to-day be decided as a case of Negligence,[7] and the modern action in Negligence is if anything stricter than the rule of *Rylands* v. *Fletcher* (cf. *North-western Utilities* case, and comment in 1 M.L.R. 39). In the case of statutory duties the standard of Negligence is fixed by statute (*Lochgelly Iron and Coal Co.* v. *M'Mullan* (1934), A.C. 1). There is no reason why the *scienter* rule should be anything but an aspect of Negligence in regard to the keeping of animals. Liability for independent contractors is no longer a test by which to distinguish strict torts from others. The rule of *res ipsa loquitur* has, in many cases, operated to shift the burden of evidence on to the defendant and thus to eliminate another difference between actions brought under Negligence or under a strict tort. It is, of course, impossible to elaborate the suggestion in more detail,[8] but the task will have to be undertaken sooner or later. And it would be of more than mere juristic importance, it would give articulate expression to what English law has in fact already recognised, that modern liability in tort is, to a large extent, no longer based on individual fault, but on a standard of conduct which is a corollary of social responsibility.

W. FRIEDMANN.

[6] Law of Tort, p. 466/67.
[7] Cf. Dr. Stallybrass, in Salmond, 9th edition, sec. 149.
[8] Cf. for details, 1 M.L.R. 39, and Underhay, 14 *Canadian Bar Review*.

Delivery of a Donatio Mortis Causa

From the time of its reception from the Civil law the *donatio mortis causa* has always had an uneasy lodgment in English equity. In *Darlow* v. *Sparks* (1938, 54 T.L.R. 627) Bennett, J., said that "it seemed difficult to ascertain whether there was any clear principle on which the Courts had acted in deciding whether a document was or was not the subject of a *donatio mortis causa*." He held that National Saving Certificates could pass in this way being substantially indistinguishable from deposits in the Post Office Savings Bank which has been allowed to pass in *Re Weston* (1902, 1 Ch. 680): "That decision had been based on the ground that the test appeared to be whether or not the document, besides acknowledging the receipt of the money, expressed the terms on which it was held and showed what the contract between the parties was." The same test was applied by Luxmoore, L.J., sitting at first instance, in *Delgoffe* v. *Fader* (1939, Ch. 922, 928). A bank deposit account book did not satisfy the test, though delivery of a banker's deposit note has several times been held sufficient to pass the amount on deposit by *donatio mortis causa*.

This test is a comparatively modern one and it is not certain whether it is the exclusive test of the validity of such gifts. The truth is that equity has changed its policy with regard to *donationes mortis causa*. They were at first only cautiously allowed and now, when the delivery of a number of documents sharing few characteristics has come to be held sufficient, there is no obvious principle common to them all. Several stages in this development can be noticed.

1. Before Lord Hardwicke held in *Snellgrove* v. *Baily* (1744, 3 Atk. 214) that a bond is a good subject of a *donatio* the law was uncertain, but the general opinion was that not only delivery but a transfer of title was required. At first equity refused to perfect an imperfect gift *mortis causa* as well as *inter vivos*: it refused, as it no longer does, to treat the executor or administrator as a trustee for the donee whose title is imperfect at law. Thus in *Parthrick* v. *Freind* (1725, 2 Coll. 362 *n*) Jekyll, M.R., did not allow delivery of bonds to amount to a death-bed gift partly because it was not made in contemplation of death "and partly because the bonds were *choses en action*, and the delivery thereof did not vest a legal property in the money." He took the same view with regard to a note not payable to bearer in the better-known case of *Miller* v. *Miller* (1735, 3 P.Wms. 356, 358).

2. But bonds, although they are *choses in action*, were permitted by Lord Hardwicke with some reluctance. With reference to *Snellgrove* v. *Baily* he said: "If I went too far in that case, it is not a reason I should go further, and I choose to stop there" (*Ward* v. *Turner* (1752, 2 Ves. Sen. 431, 442)). In the latter case he held that the delivery of receipts for annuities was not sufficient and explained that a bond, being a specialty, was in a peculiar position: The person to whom a specialty is given may cancel or destroy it, the consequence of which is that he is given the power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert *in curiam*. The donee may thus prevent the personal representative of the donor-testator from recovering on the bond. Apart from the much criticised case of *Lawson* v. *Lawson* (1718, 1 P.Wms. 441) there seems to be no instance of a thing in action other than a bond or deed passing as a *donatio mortis causa* until after *Duffield* v. *Elwes* (1827, 1 Bli. N.S. 497).

3. In the last-mentioned case Lord Eldon pointed out that the doctrine relating to profert had become less strict than it was in Lord Hardwicke's time: equity had developed its doctrine relating to lost instruments. This change was made to justify the ruling in *Moore* v. *Darton* (1851, 4 De G. & Sm. 517) which is the turning point in the history of the subject. It was there held by Knight Bruce, V.C., that the delivery by the lender to the borrower of a receipt for the loan containing the terms of the debt was a sufficient *donatio* of the sum lent. The Vice-Chancellor admitted that "the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty" and that the earlier cases had not gone to the length of deciding that the delivery of the mere evidence of a debt would be sufficient. But he stressed the fact that the rules about proof of a specialty debt had been relaxed. Further, he was able to hold that the receipt was "something more" than mere evidence of the debt. A debt would have arisen without any writing but it would not have carried interest without a contract to that effect: such a contract could have been made orally but the document before him contained the terms relating to the interest payable. Hence, in practice, the position was similar to that of a bond: as the particular contract "was created by writing, proof of the writing, if possible, was essential to recovery upon the contract. This writing was therefore in a sense essential to the proof of the contract; and it is this writing which was in substance delivered *mortis causa* to the person owing the money."

4. It has been found difficult to apply this evidentiary test of sufficient delivery in the modern cases. There is in the cases hardly a consistent treatment of the multifarious documents that have come before the Courts. *Moore* v. *Darton* itself is a strong case for the donee himself was the person bound by the document; but it is quite clear at the present day that this factor is by no means essential. There are suggestions of different tests from the one applied in that case. In *Re Weston* (1902, 1 Ch. 680, 683) Byrne, J., asked: "Is not the true test this—Has the donor done all in his power to transfer the property?" But this suggestion is unsound: "I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causa*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor." This is the opinion of Lord Eldon in *Duffield* v. *Elwes* (*op. cit.*, 530, 531). Byrne, J., seems to have been thinking of a similar test that has been applied to the assignment of *choses in action* in equity. But the law on that subject is not in point any more than the maxim, "equity will not perfect an imperfect gift." In *Re Craven's Estate* (1937, Ch. 423, 428) Farwell, J., said: "It seems to me that there must be such a parting with the dominion over the chattels or the property as to prevent the subject-matter of the *donatio* being dealt with by the donor in the interval between the *donatio* and either the death or the return of the articles by the donee to the donor." In this case the donee had been given a power of attorney over certain securities and authorised to have them transferred into his own name: as they had been so transferred the *donatio* was upheld. It is clearly insufficient to grant a power which is not acted upon, nor can shares in a company be transferred by delivery of the share certificates. But it hardly seems necessary to go so far as to say, with Farwell, J., that the donor must be prevented from dealing with the property, anyhow in

the case of things in action. It appears to be sufficient if he makes it more difficult for him to deal with it. As Luxmoore, L.J., said in *Delgoffe* v. *Fader* (*op. cit.*, 927): "There must be delivery of the subject-matter of the gift to the donee, or, I think, a transfer of the means of, *or part of the means of*, getting at the property." A transfer of the evidence of the thing in action is covered by this statement. Yet shares cannot pass by delivery of the share certificates because, unlike National Saving Certificates, they do not contain substantially all the terms of the contract.

"The effect of these nice distinctions is to increase litigation, because no advice can be given in such a state of the law." This statement of counsel in *Duffield* v. *Elwes* (*op. cit.*, 508) is also true at the present day. It is gratifying for a writer in this REVIEW to note that Lord Eldon's desire for reform was not confined to the abolition of trial by battle; he also favoured a forward policy with regard to the *donatio mortis causa*: "Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causa* was struck out of our law altogether, it would be quite as well" (*ibid.* 533).

W. H. D. WINDER.

The Rule in Russell v. Russell

The reluctance of experienced divorce judges to apply *Russell* v. *Russell*, [1924] A.C. 687, which prevents spouses from giving evidence of non-access in divorce proceedings, led to the growth of many exceptions to the rule, but the Court of Appeal in *Ettenfield* v. *Ettenfield*, [1940] 1 All E.R. 293, has stopped this tendency and reaffirmed the rule in its most uncompromising form. Speaking through Goddard, L.J., the Court said (at p. 301)—

> "The rule that evidence tending to bastardise or legitimise a child conceived and born during wedlock cannot be given by either spouse is absolute, and applies, not only where the parties are living together, but also when they are separated either by a decree of a court of competent jurisdiction or by their own volition."

In order to reach this conclusion, they had to overrule *Mart* v. *Mart*, [1926] P. 24, and *Stafford* v. *Kidd*, [1937] 1 K.B. 395, as well as limiting the scope of *Hetherington* v. *Hetherington* (1887), 12 P.D. 112, which was explained as follows (at p. 298)—

> "It decided that, where spouses are separated by sentence of divorce *a mensa et thoro*, children born to the woman during the separation are presumed to be bastards, but that, if the parties separate without a sentence—that is, voluntarily—the presumption is that the children are legitimate until the contrary is proved. There is not a word in this case to suggest that the spouses were competent witnesses either to prove or to disprove legitimacy."

Though the first of these statements is correct, it is submitted that neither of the two which follow can be supported.

In the first place, there is absolutely no discussion in that case of the position which arises where the parties separate voluntarily, and the authority, such as it is, for the proposition that unless the spouses are parted by order of a Court there is a presumption of legitimacy, has to be sought elsewhere, particularly in *Morris* v. *Davies* (1837), 5 Cl. & F. 163, and *Inter the Parishes of St. George and St. Margaret, Westminster* (1706), 1 Salk. 123.

The latter case, according to Goddard, L.J. (at 297), "formed the foundation of the judgment of Sir James Hannen, P., in *Hetherington* v. *Hetherington*," so that we are a little surprised to find no mention of it in two out of the three reports of the learned President's judgment. It was a settlement case in which a woman, after being divorced *a mensa et thoro* from her husband, lived with and had children by another man; the Court said—

> "When a woman is separated from her husband by such a divorce, the children she has during the separation are bastards; for we will intend a due obedience to the sentence, unless the contrary be shewed; but if baron and feme without sentence part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved; for access shall be intended: but if a special verdict find the man had no access, it is a bastard."

The remarks about the presumption of legitimacy where the spouses separate voluntarily are *obiter*. It is, moreover, clear that the Court was not considering the position when the spouses lived apart under a separation agreement; indeed, it would have been remarkable if it had, for separation agreements were generally viewed with disfavour as being contrary to public policy and were regarded as unenforceable, at least in equity, except for such parts as dealt with matters of property, down until 1862 (*Westmeath* v. *Westmeath* (1821), Jac. 126, 142; see Lord Atkin in *Hyman* v. *Hyman*, [1929] A.C. 601, 625). But now that such agreements are enforced by the Courts, why should obedience to them not be presumed just as much as to decrees of the Court? *Morris* v. *Davies* is a stronger case, for though the parties were separated by deed, the House of Lords did not regard that as being material and reaffirmed the statement of the judges in the *Banbury Peerage Case* (1811), 1 Sim. & St. 153, 158, that where a husband and wife are not separated by divorce *a mensa et thoro* sexual intercourse between them is presumed to have taken place, with the result that any child born to the woman is presumed to be legitimate. But *Morris* v. *Davies* was a Chancery case decided by Chancery Law Lords at a time (1837) when Chancery was still refusing to give full effect to separation deeds, so that it can scarcely be considered as conclusive to-day. The Lord Chief Justice was correct when he said in *Stafford* v. *Kidd*, [1937] 1 K.B. 395, 400, that "*Morris* v. *Davies* belongs to a period when divorce (*sc. a mensa et thoro*) alone could get rid of the presumption of legitimacy," and that "the chronology makes an important difference, and the more recent decisions . . . are the guides which at this date the Court ought to follow." Moreover, *Morris* v. *Davies* must be read in the light of Lord Blackburn's remarks in the *Aylesford Peerage Case* (1885), 11 App. Cas. 1, 16, where he said—

> "I will only observe that in this case no question whatever arises as to those presumptions which follow from the existence of matrimony as to the birth of children *whilst the husband and wife are living together*" (italics supplied).

It seems, therefore, that the Court of Appeal was not bound by authority to hold that where the spouses live apart under a separation agreement children born to the women are presumed to be legitimate.

Secondly, it is incorrect to say of *Hetherington* v. *Hetherington* that "it has nothing to do with the competency of the spouses to give evidence" (p. 299). In that case the spouses were living apart under a separation order

and the magistrates had refused to admit the husband's evidence of non-access and the wife's admission that he was not the father of the child. The comment of Hannen, P., on this exclusion was as follows (12 P.D. at 114)—

> "Unfortunately in refusing to act *on the evidence of the parties* they seem to have been under the impression that the issue was one of bastardy, which it was not, but one of adultery" (italics supplied).

The necessary implication to be drawn from this statement is that the spouses can give evidence of non-access in proceedings concerning adultery, though not bastardy. Originally, as Wigmore has shown (*Evidence*, second edition, s. 2063)—

> "That the fact of non-access, of itself, was a thing not proper to be testified to, either on moral or sentimental grounds, or that the parents could not testify to illegitimacy, never for a moment occurred to these judicial expounders of the common law,"

nor was there any rule in the Ecclesiastical Courts which excluded such evidence. It was an innovation when Lord Mansfield held in *Goodright* v. *Moss* (1777), 2 Cowp. 591, that decency, morality and policy prevented the Courts from allowing spouses to deny intercourse so as to bastardise issue, and this innovation was confined to proceedings in which legitimacy was the main question till the House of Lords saw fit to extend it to divorce proceedings in *Russell* v. *Russell*. In that case the parties were actually living together, but now the Court of Appeal has said that spouses cannot give evidence of non-access even when they are living apart under an order of the Court or a separation agreement.

The rule in *Russell* v. *Russell* is difficult enough to justify when the spouses are living together, as Lord Sumner's powerful dissenting judgment shows, but it is insupportable where the spouses are living apart, whether by agreement or by order of the Court. According to Lord Birkenhead in that case ([1924] A.C. 687, 698), evidence of non-access is excluded because it would tend "to invade the very special sanctity inherent in the conjugal relation." It is difficult to ascertain what conjugal relation there was between the parties in *Ettenfield* v. *Ettenfield* which could be violated. The matrimonial life had been broken up and there had been no *consortium* for over twenty months before the child was born, so that the parties were husband and wife in name only. In *Fender* v. *Mildmay*, [1938] A.C.1, where a promise of marriage was made to the appellant by a man after his wife had obtained a decree *nisi* against him, the House of Lords adopted a practical approach to the question, and it is to be hoped that if and when *Ettenfield* v. *Ettenfield* comes before them, they will show the same aptitude for looking facts in the face.

D. W. Logan.

Alien Enemies

Geiringer v. *Swiss Bank Corporation, Oesterreichische Creditanstalt* v. *Geiringer*, [1940] W.N. 46, [1940] 1 All E.R. 406. This, the first decision of the present war as to the position of alien enemies, adds nothing to the law on the subject. Nevertheless, the point involved was a curious one. In April, 1939, the plaintiff Geiringer, who was resident in New York, commenced an action against the London office of a Swiss bank for a declaration that the defendants held certain securities as trustees for him;

he also applied for an order that the securities or the proceeds of their sale should be delivered to him. The defendants interpleaded, deposing that they had originally held the securities in dispute for the account of their Zurich office but that, in July, 1938, they had been instructed by the latter to transfer them to the account of the Vienna office of the claimants, the Oesterreichische Creditanstalt, a company incorporated under the laws of Germany. The Master granted an interpleader order for the trial as between the plaintiff and the claimants of the issue as to which of them was entitled to recover the proceeds of the sale of the securities. The order provided that the claimants should be plaintiffs in the issue, and the plaintiff in the action defendant.

Notwithstanding that war had meanwhile broken out between Great Britain and Germany, the claimants delivered their points of claim in the issue on 7th October, 1939. The plaintiff thereupon asked for an order for security of costs on the ground that the claimants were not within the jurisdiction; alternatively he sought that the claimants might be for ever barred against the defendants in the action.

Bennett, J., was of opinion that it would be unfair to make an order for security of costs, with which the claimants obviously could not comply. For, as the claimants were admittedly alien enemies, they could not proceed with their claim during the period of the war. Equally, it would be unfair to make the order asked for in the alternative. Notwithstanding that such an order would not determine the rights of the claimants against the plaintiff in the action, it would enable the latter to obtain possession of the securities in dispute and thus would, or might, prejudice the claimants. It might put them in a position in which they might have to sue the plaintiff, of whose solvency nothing was known, in the United States; it would certainly deprive them of any action against the Swiss Bank, which was in a sound financial position. On the other hand, it would not be right to leave the plaintiff without a remedy during the war, since this would harm him if his claim were good, and would benefit the enemy claimants if it were not good. It would have been possible to re-frame the issue so that the plaintiff in the action became also plaintiff therein. But this course had already been suggested by the Master to the plaintiff, who had refused to take it. All that the Court could do, therefore, was to dismiss the summons before it, giving the plaintiff leave to appeal to the Court of Appeal.

The decision turns upon questions which are, for the most part, purely technical. Yet it is to be noticed that the fact that the plaintiff himself was not within the jurisdiction is not necessarily of much importance. As is well known, the general rule of English law is that an alien enemy cannot in any circumstances sue. It was held as long ago as 1794 that it made no difference if the action could in no case put money into the pocket of the enemy plaintiff.[1] A qualification upon the general rule was admitted by the House of Lords in the case of *Rodriquez* v. *Speyer*.[2] The head-note to that case merely states that the general rule does not apply to "an action in which, for the purposes of winding up the affairs of a (*semble*: English) partnership dissolved on the outbreak of war by reason of one of the partners having become an alien enemy, the latter is joined as a co-plaintiff." But the exception is clearly wider than this: it is not limited to partnership, nor to cases where the co-plaintiffs are British

[1] *Brandon* v. *Nesbitt*, 6 T.R. 23.
[2] [1919] A.C. 59.

subjects. Lord Finlay, L.C., in his judgment, stated that "If . . . to prevent an alien enemy from being a party to an action as plaintiff would do much more harm to British subjects *or to friendly neutrals* than to the enemy, this is a consideration more material to be taken into account in determining whether such a case falls within the true scope and extent of the rule [that an alien enemy cannot sue]."[3] Presumably the learned judge took the view that no such consideration existed here; but the point was not referred to. The difficulty caused by the claimant's inability to sue could have been surmounted by the plaintiff agreeing to the scheme suggested by the Master—that he should be made plaintiff in the interpleader issue as well. Possibly that would have made some difference to his rights in that he himself might have been required to furnish security for costs, and in that the onus of proof would be shifted to him. But, if he had faith in his claim, these differences would not have been very serious.

CLIVE PARRY.

Taxation of Company Profits

Although *Cull* v. *Inland Revenue*, [1940] A.C.51 turned upon the narrow technical interpretation of a minor section in the Income Tax code, it provides a pendant upon which to consider the basis of taxation of corporate bodies and their shareholders. Rule 1 of the All Schedules Rules, Income Tax Act, 1918, provides that a body of persons—which term statutorily comprehends a limited company—shall be charged to income tax in the same way as any other person; Rule 20 of the same Rules, re-enacting in almost identical terms similar provisions in the Income Tax Act, 1842, provides that upon payment of dividends, etc., to its shareholders, a company is entitled (but not bound—A.F.) to deduct tax at the rate appropriate to the dividends. The origin of this rule is, probably, that in 1842 a joint-stock company was regarded somewhat in the light of a large partnership so that payment of the tax due upon its profits by the company would be regarded as discharging the quasi-partners from any further liability to direct assessment to tax on their dividends; the analogy with a partnership was carried further by allowing the company to recover from its shareholders a proportionate amount of the tax it had borne. For many years after 1842 the company was regarded as paying the tax as *agent* for its shareholders, cf. *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562. Since, however, a company is statutorily chargeable upon its profits as a "person" and since it is an entity distinct from its shareholders— *Salomon & Co.* v *Solomon*, [1897] A.C.22—it is clear that this theory could not hold water and it has long been discredited *vide*, for example, Viscount Cave, L.C., in *Inland Revenue* v. *Blott*, [1921] 2 A.C. 171, 201, where he said: ". . . a company paying tax, does not pay tax as agent for the shareholders but as a taxpayer. . ." and similar dicta in *Inland Revenue* v. *Dalgety & Co., Ltd.*, [1930] A.C. 257, *Inland Revenue* v. *Neuman*, [1934] A.C. 215 and the instant case. The shareholders are thus not liable to be assessed again to income tax upon their dividends but are entitled, if their personal circumstances so permit, to claim from the Revenue repayment of tax, in whole or in part, suffered by them. For the purposes of Sur-tax, however, the shareholder is liable to pay upon the gross amount of the dividend before deduction of tax—this is, of course, equitable since a company is not liable to Sur-tax and no question of double taxation can arise.

[3] *Ibid.*, 66.

Cull's case turned upon the interpretation of Section 7 (2) Finance Act, 1931, which provides that "a dividend paid out of profits or gains shall be deemed to represent the amount of income which after deduction of tax under Rule 20 All Schedules Rules equals the *net* amount received"; it was held that the House of Lords was bound by its prior decision in *Neuman's* case (*cf. supra*) which had seemed to turn on its own particular facts and that where a dividend was paid "without deduction of tax" the amount to be taken into account for the purpose of the shareholder's liability to Sur-tax was the *actual* amount received by him and not the larger "grossed-up" sum which after deduction of tax would yield the actual sum received by him. It should be noted in this regard that a dividend paid "free of tax" has long been regarded by the Courts—following the decision in *Ashton Gas Co.* v. *Attorney-General*, [1906] A.C. 10—as the equivalent for income tax purposes of a gross dividend amounting, after deduction of tax, to the net amount received. It is thus open to a company to vary the liability of its shareholders to Sur-tax by the mode in which it pays its dividends, i.e. less tax or "free of tax" or, alternatively, "without deduction of tax"; the purpose of the Legislature in enacting Section 7, Finance Act, 1931, which was intended to avoid such anomalies, is thus vitiated by the decision in *Cull's* case and we may expect the defect to be remedied by Parliament in the next Finance Act—it is obviously incongruous that the *ex-parte* act of, say, a private company should operate to place its shareholders in a better position than those of a public company where both receive the same *net* dividend. It may also be observed that, if the decision remains, the small shareholder who receives a dividend "without deduction of tax" will not be entitled to claim repayment since he will have suffered no deduction of tax!

The House of Lords at the same time as it gave its decision in *Cull's* case also considered—in *Barnes* v. *Hutchinson*, [1940] A.C. 81—a contention by the taxpayer-respondent that, where a foreign company, of which he was a shareholder, had received dividends under deduction of tax from British companies, he was entitled to be relieved from direct taxation on his dividend proportionately to the amounts of income of the foreign company which had, and had not, borne British income tax—otherwise, it was argued he would,to an extent, be doubly taxed on the same source of income. The taxpayer relied on *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562, a somewhat similar case but decided under the now exploded theory that a company paid income as agent for its shareholders (*cf. supra*). The House of Lords gave the contention short shift, holding, in effect, that there were two entirely distinct incomes under review, viz. the foreign company's aggregate income, including the British dividends, and the respondent's dividends from his holding in the foreign company; these latter could in no sense be said to have borne British income tax—the *same* income had not suffered double taxation, so that no relief was due. A fuller account of *Barnes'* case than space will here allow will be found at 56 L.Q.R. 24/6.

A. Farnsworth.

Depreciation Allowances

In the assessment of business profits for the purposes of the Income Tax Acts, any deduction or allowance for capital expended, or used up, is forbidden; this prohibition has long been held to prevent any allowance for "wasting assets" even though the taxpayer may make such provision

in his accounts and thereby reduce the amount available for distribution, see, *inter alia*, *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 315, and *Aliauza & Co., Ltd.* v. *Bell*, [1906] A.C. 18. Parliament has made two breaches in this rule, firstly, by way of an allowance (dating from 1878), in computing profits, in respect of the diminished value of plant and machinery by reason of wear and tear, and, secondly, since 1918, an arbitrary allowance, calculated on annual value, in respect of premises used as mills, factories, or for like purposes; this latter allowance is meant to provide for the exceptional depreciation caused to such properties by the vibration of the machinery. Business men have long complained of the inequity of charging them in full on the profits derived from "wasting assets" but, despite a favourable recommendation by the Royal Commission on the Income Tax (1920—Cmd. 615—pp. 41/8), Parliament has been adamant in refusing any relief.

Until 1937 the allowance for depreciation of buildings was confined to the owner-occupier of the premises housing the machinery but, by Section 15 (5) of the Finance Act of that year, this was extended to a tenant-occupier of such premises who, under the covenants to repair contained in his lease, bore "*the whole of the burden of any depreciation of the property.*" In *Boarland* v. *Pirie Appleton & Co.* and *Stemco Ltd.* v. *Inland Revenue* (1940), 1 All E.R. 539, the Courts had to consider the interpretation of this sub-section; in the former case the whole burden of *maintenance* fell on the tenant with a saving for general failure of the structure while, in the latter case, there was the usual strict covenant to repair save that the landlord undertook to maintain the heating apparatus. It was argued for the taxpayers that the sub-section should be interpreted liberally since there never was a lease and never were covenants to repair which threw "the whole burden of the depreciation of the property" on the tenant; thus the relief given by the sub-section, if it was strictly construed, could never be operative. Wrottesley, J., held that the literal meaning of the words could not be departed from and, further, observed that there was no real hardship on the tenant-occupier in such cases since he was allowed, in computing his taxable profits, to deduct the extra cost of maintenance and repair due to the excessive vibration of the machinery; the resulting fall in the value of the factory fell—as regards the leases under review—not on the tenant but on the owner when the lease had expired; since the tenant suffered no loss by reason of the depreciation of the property, he was under no injustice. The decision seems unimpeachable and the objection that there are no leases to which the sub-section can be applied is empty of content since it should be easy to provide appropriate words, in that section of a lease containing the covenants to repair, whereby the tenant undertook to bear the whole cost of the depreciation of the property; whether the taxpayer would gain on balance is very much open to doubt as the comparatively small saving in tax would probably be incommensurable with the heavy liability arising at the termination of the lease.

A. Farnsworth.

Trust or Contract? Deeds in Equity

The perpetual fact that the same transaction may have a different effect according as the principles of the common law or equity are applied is given an unusual illustration in *Naas* v. *Westminster Bank Ltd.* (1940, 1 All. E.R. 485). The variance was not caused by any conflict of principle but arose because the majority of the Court of Appeal thought in terms

of the formation of contract and the House of Lords in terms of a declaration of trust. The case also provides a view of one of those semi-extinct creatures of equity whose rare advent is still able to excite the curiosity of common law judges.

The somewhat complicated facts may be summarised as follows. In a deed executed in 1923 A covenanted to pay Miss W a weekly sum to be applied to the maintenance of herself and a son then expected to be, and afterwards in fact, born. By that deed A had an option to execute a settlement by which similar benefits should be secured to W and the son, such settlement to be in satisfaction of the weekly sum payable under the deed. A settlement was engrossed to which A and W were parties, the plaintiff bank being also named as a party as the trustee. The settlement secured benefits similar to those in the deed of 1923, and further contained a release of the covenant in that deed. After being executed by A the settlement was unconditionally delivered to W, but neither she nor the bank ever executed it. The property settled was India stock in the bank's name. After the execution of the settlement this was sold by the bank and the proceeds paid to A. W sought a declaration that the handing over of the proceeds of sale constituted a breach of trust.

Although there was no question of the settlement having been delivered as an escrow Scott and Clauson, L.JJ., in the Court of Appeal (1938, 3 All E.R. 652) felt able to refuse the declaration asked for. In the words of Lord Russell of Killowen they appeared "to have dealt with the matter as if it lay in contract and was governed by the rules as to offer and acceptance, with time being in some way of the essence of the contract, whereas the case is really one of a divesting and vesting of property" (p. 499). Once the settlor signed, sealed and unconditionally delivered the deed, the trusts in favour of the appellants were constituted: they became the persons beneficially interested in the stock and the settlor had no power to revoke the trusts unless such a power was contained in the settlement. Any question of consideration was irrelevant. "In the opinion of Scott and Clauson, L.JJ., however, that is not its true effect in law. In their view, it was not intended to be a unilateral declaration of trust which would have effect whether or not the first appellant executed it, but was to be construed as a consensual document, requiring for its operation that the first appellant should concur in it by executing it" (per Lord Wright, p. 508). This view of the Court of Appeal was not based on any express condition precedent but on the supposition that the intention was to create the trust only if it superseded the obligations under the earlier deed of covenant and that this supersession could only be effected by the execution of the settlement. According to Lord Wright the Court below had assumed that "the position was analogous to that which arises when one party makes a written offer to another party and the latter does nothing more. There, it is said, there is no acceptance, no consensus, and no legal result." This view was unanimously rejected by the House of Lords. It might have been expected that W would execute the settlement, but it was not a condition of the settlement, which was unilateral. "I think it is misleading to import into the law of deeds analogies from an entirely different region of law—namely, that of simple contracts. They, indeed, are consensual, and depend on a meeting of minds in a common intent, evidenced by words or conduct. It is from this mutual consent that the rights and duties under the agreement arise. This might be the position in a case of a simple agreement to convey property, but the deed in question is some-

thing different. The declaration of trust by the settlor depended, not on the other party's consent, any more than on mutual consideration, but on an act of the settlor in executing the settlement." While there are difficulties in the analysis of a simple contract as a meeting of the minds of the contractors, this is a welcome warning by Lord Wright against the dangers of twisting every "contract" into an offer and an acceptance. As he points out, the law as to obligations or transfers under seal was fixed in days before the nature of the consensual contract was realised. The true question before the Court was, Had there been a declaration of trust? Equity has a simpler answer to that question than any that can be made to that modern query in simple contracts, Where is the offer and the acceptance?

In the Court of Appeal, Greene, M.R., rightly held that *prima facie* a trust had been constituted but refused the declaration that there had been a breach of trust on a purely equitable ground. He relied on a dictum of Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.* (11 Ch.D. 121, 125): "It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties, the deed does not bind in equity if the third refuses to execute." The most common instance of this equity is the case (such as *Evans* v. *Bremridge* (1856), 8 De G.M. & G. 100) where only one of two co-sureties named in the deed in fact executes the deed, and it is sought to enforce the deed against the one who did execute. As stated by Sir George Jessel, the principle was held by the House of Lords to be too broad and general, though its precise limits are difficult to ascertain. It puzzled Lord Wright: "That there is some principle in equity I do not doubt, however reluctant as a common lawyer I may be to weaken the legal effect of the solemn undertaking involved in a conveyance or covenant under seal" (p. 509). He thought the word "faith" was not very happy though he was on safe ground in saying that it was not used in a theological sense. But Sir George Jessel was not guilty of initiating the use of this vague term to explain the principle. It is to be found, for example, in the judgments of Turner, L.J., in *Re Dover etc., Ry. Co.* ((1855), 7 De G.M. & G. 43, 52) and *Evans* v. *Bremridge* (*op. cit.*, p. 109). In some cases the word "assumption" or "understanding" has been used in this context. More than mere intention or expectation in the settlor's mind is meant.

After *Naas* v. *Westminster Bank Ltd.*, the equity can be taken to have a narrower definition. Lord Russell of Killowen did not think that "the proposition can be carried further than saying that the equity arises where a deed is sought to be enforced against an executing party, and, owing to the non-execution by another person named as a party to the deed, the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact executed the deed" (p. 500). As so defined it had no application to the facts of the case; there is no instance of any such equity against a non-executing party who seeks to enforce benefits conferred upon him by the deed: there is no foundation on which the equity could rest, for by his action he is affirming and adopting the provisions of the deed, and he is bound by it as effectually as if he had executed it. Even as thus limited, however, this neglected equity would seem to have powers of unexpected development.

W. H. D. Winder.

REVIEWS

THE LAW OF THE CONSTITUTION. By A. V. Dicey, K.C., Hon. D.C.L. Ninth Edition, by E. C. S. Wade, M.A., LL.D. 156 and 681 pp. Macmillan & Co. **15s.** net.

Generally speaking, it is undesirable for an editor to produce a new edition of a book so impregnated with the author's personality as Dicey's *Law of the Constitution*. An ardent disciple could, perhaps, touch up the text here and there so as to make it appear a little less antediluvian; but it is doubtful if any modern lawyer could continue on Dicey's lines without reservations. The *Law of the Constitution*, too, was not only intensely personal; it was in addition a *pièce de circonstance*, as evidently a justification of the Whig view of the Constitution as Locke's two treatises. The long Introduction to the eighth edition was even more of a political tract. It expressed the views of an old Whig who now found himself in the Unionist Party because of Mr. Gladstone's attitude to Home Rule. It expounded Unionist views on women's suffrage, proportional representation, Home Rule, and the referendum. The whole book is written with academic detachment. It was not intended to sway votes at the election of 1886 or even at the election which would have been held in 1915 if there had been no war. It had none of the casuistic argument of Dicey's polemical contributions to the Home Rule Debate, such as *England's Case against Home Rule* (1886) or *A Fool's Paradise* (1913). It did not say, for instance, that Parliament would remain sovereign until Mr. Asquith put sovereignty into a Home Rule Bill, when it would not be sovereignty at all. Nor did it assert that the Rule of Law permitted a Unionist to follow Sir Edward Carson in taking the Covenant to resist by all necessary means the application of the Government of Ireland Bill, when enacted, to Ulster. It consisted of lectures delivered by the Vinerian Professor and not of political speeches delivered by the orator who went the round of the country houses in order to speak to the lower orders about the iniquities of Mr. Lloyd George. It was, nevertheless, not an analysis of the Constitution as it stood but an analysis of the Constitution as it appeared to a Whig who, a few months later, became a Liberal Unionist.

There are now no Unionists except in Ulster, and it is doubtful if anybody knows what Dr. Wade's views on Home Rule are. *Laissez-faire* is now urged by few—probably by none outside the London School of Economics. We know all about the social services, including those in existence in 1885 which Dicey ignored. Constitutional lawyers to-day read statutes, as evidently Dicey rarely did—the chapter on Public Meeting may be good liberalism, but it was bad law even in 1885 because Dicey had not looked at the statutes. Is it possible, then, for a new edition to be produced? When Dr. Wade first mentioned to me that he had undertaken the task, I thought that he had made a mistake. Reflection suggested, however, that though Dicey's book was impregnated with the ideas of a section of opinion in his own day, the simplicity of the style, the flattery of the Englishman's self-esteem implicit in the comparisons with the constitutions of lesser breeds, and above all the fact that the Whigs created a tradition in lists of books recommended, have established the notion that Dicey was expounding the Constitution as it existed and still exists, and not

the Constitution as he desired it to be. It is therefore desirable that, while the text of the body of the book should stand, there should be some explanation of the criticisms which have been made against it, and some reference to the remarkable omissions.

Dr. Wade has, I think, performed a delicate task extremely well. He has obviously been much oppressed by lack of space, but he has been very fair in his statement of the criticisms. The fact that he gives his own support to those criticisms suggests that the accusation that they are based upon a view of the Constitution no less partial than that of Dicey's is not firmly based. It is, of course, true that every constitutional lawyer is affected by his bias. I have noticed on my own part a tendency to forget the Church of England, though I never forget the Nonconformist Conscience. But the criticism of Dicey is not that his politics were wrong but that his Constitution did not exist. It is not that the Rule of Law is undesirable, but that it was not correct analysis of the British Constitution of 1885 and has become even more incorrect since. I can affirm as a fact that my own criticisms of Dicey, published in the first edition of *The Law and the Constitution* in 1933, had not their origin in political opinions. My first lectures on constitutional law were based essentially on Dicey and Anson. My independent research was directed primarily to constitutional conventions; and my first criticisms of Dicey related to his treatment of those conventions. I had also investigated parts of the law relating to proceedings against the Crown, but without realising that the special rules were quite inconsistent with the Rule of Law. My criticism of the Rule of Law began with his contrast with *droit administratif*. After some five years my conscience smote me that I was following an amiable but lazy tradition by lecturing on French administrative law without having read a single book on the subject. A glance at Hauriou and some digging into Jèze showed that I had been talking complete nonsense. After that the Dicey structure began to tumble down; but the finding of political reasons for Dicey's errors came after the discovery of the errors themselves. Perhaps the explanation of Dicey's psychology has retarded the acceptance of the criticisms; but the error was an honest one—I wanted not only to explain that Dicey was wrong but also why such an intelligent person went wrong.

The production of Dr. Wade's edition impelled me to read Dicey himself once more, probably for the sixth or seventh time. I was astonished to find that I was bored. My recollection was of a rather long-winded book which contained much pregnant observation in addition to the general argument. Perhaps the incidental remarks have become so much a part of our heritage that they are no longer worth saying; yet Bagehot's quips have become commonplaces without ceasing to instruct and amuse. Perhaps, also, a constitutional lawyer who has been thinking of these things for many years is no judge of a book written fifty years ago for the student and the layman; yet Bagehot wrote about things to which I have paid even deeper attention, and his book is made up of review articles. No doubt the academic style, the repetition of the argument to make certain that it is clear, the slowness of the development to make sure that the uninstructed reader is following, were more suited to the deliberation of the Victorian age than to the speed of to-day. I suspect, however, that the Whig Bagehot wrote a classic, whereas the Whig Dicey wrote a book of profound historical influence which need no longer be read.

W. I. Jennings.

THE DILEMMA OF PENAL REFORM. By HERMANN MANNHEIM. pp. 238 (with Index). London: George Allen & Unwin. **7s. 6d.** net.

Criminology may properly be regarded as a branch of sociology, which is the cinderella of the sciences. Curiously enough, however, criminology was seriously studied as a science long before sociology, and in the work of Lombroso a standard was set for later workers which is far from having been generally maintained. The great difficulty in the social sciences, and perhaps most of all in sociology, is the difficulty of applying the empirical method which has proved so valuable in the pure sciences. Sociologists are naturally better aware of this than most of those who attack them on this score, and have attempted to deal with the problem by means of field work, for which there has always been a paucity of skilled observers, and by the elaborations of statistical methods; alas, here, too, only a minute fraction of the very small army of competent statisticians has been obtainable. In the result progress has been slow.

There is no branch of sociology which is so susceptible to the use of the experimental method as criminology, and especially the dominant section of it, penology. The prison population is under fairly close control, and the number of recidivists being a high proportion of the whole is under control for long periods. To make proper use of this unique opportunity, which would surely yield material of value beyond the immediate confines of this field of study, would, however, require highly trained scientists among those in control of prison administration, and among the administrators themselves. Although of recent years there have been signs of a movement in this direction we have been too often fobbed off with goodwill, which certainly does not provide more than a groundwork for action. In the result criminology has had very largely to rest on subjective analysis supported by field statistical work whereby its fruits have been as small and unripe as those which have grown upon the other branches of the tree of sociology, and this even in the U.S.A. and other countries where much money has been spent on manures.

In England there has been a deplorable lack of support for the scientific study of this subject, an apathy which may be regarded as extraordinary considering the enormous loss to the community, both material and moral, which criminality involves. Such work as has been done, and it has occasionally been of a high order, has been that of interested individuals, more particularly of medical men in the service of the Prison Commissioners. We need only refer to the investigations of Dr. Gore which radically affected certain theories of Lombroso relating to hereditary criminality. The result is that criminology has made less progress here as a science than in any other of the leading countries. At the same time penal reform has made considerable headway under a series of enlightened commissioners of prisons. If, therefore, a scientific training could be provided for and insisted on in the prison administration, the way would be open for an immediate advance of a character not previously experienced, both in the working of the penal system and in the development of criminology.

Of this there has been certain signs in the sky. The most significant of these is the provision of proper training for probation officers and others engaged in prison administration under the aegis of the Home Office, and the inauguration of regular university teaching in the subject in the University of London, at the London School of Economics under Dr. Hermann Mannheim, author of the volume under review. His work may

herald the opening of a new era, it is sincerely to be hoped so, and mark the beginning of that scientific training for penal administrators which we have insisted is necessary before a really satisfactory criminology can be built up. Dr. Mannheim has two advantages for his present task. He is a distinguished criminal lawyer, and criminology has suffered much in the past through being regarded by lawyers, who are apt to have the last word, as a subject for cranks. He has also been for many years a judge in criminal courts, which makes him the less exposed to the danger of a purely theoretical disquisition, and this in the absence of facilities for experimental verification has too often characterised the work of sociologists.

These qualities are notable in the present volume, which is in substance a course of public lectures given at the London School of Economics in 1939. Although the author is naturally concerned with presenting to an inexpert public the main elements of an exceedingly troublesome problem, and never therefore moves far from well-explored territory, his work is informed by an alert, liberal and inquiring intelligence which gives it much of the value of originality. Moreover, he covers the ground with such care, without losing himself in unnecessary detail, that the book forms a real conspectus of the subject, and will be invaluable as an introductory survey for all students newly approaching the study of criminology. Indeed, from this point of view it is something for which we have long been waiting in this country; the rather more comprehensive work of Dr. Bonger undertaken in a foreign milieu having the defects of its origin.

After an introduction of profound interest in which he discusses such matters as the ethical basis of criminal law, and the effect of changing conceptions of social values upon criminality, Dr. Mannheim proceeds to his first chapter in which he examines the rôle of the economic factor in penal history. Under the pervasive influence of Marx the history of everything is apt nowadays to be seen through economic spectacles, and there can be no doubt as to the importance of this factor in the evolution of modern forms of punishment. As elsewhere, however, it is not the sole, or even perhaps the dominating force, and Dr. Mannheim, while according it due influence, finds that, especially in the most recent era, moral factors have played an increasingly important part.

One of the most important economic factors making against penal reform has been the principle of less eligibility, which postulates that the lot of the prisoner must always be made more hard than that of the worst-off honest man outside. This doctrine, which makes an instantaneous psychological appeal to the man in the street, has always been, and still is, a stumbling block. It is handled by Dr. Mannheim with a critical intelligence, and yet with understanding sympathy.

The following chapters are concerned with the social dilemma, where again the less eligibility principle furnishes a peg on which to hang some acute constructive criticism. Here Dr. Mannheim is naturally much concerned with the question of stigma, which has become of increasing importance in modern times. Against this background he discusses probation and the Borstal system.

In the final chapters the legal problem is dealt with, more particularly in connection with procedural machinery, the importance of which has not always been recognised. Here we learn particularly about the Juvenile Court and its problems, and about the proposals for divorcing the trial

of a prisoner from the sentencing by means of Treatment Tribunals. In a thoughtful concluding chapter Dr. Mannheim introduces us to some possible future trends of penal reform. These have been foreshadowed in the earlier descriptive parts of the volume, and are largely concerned with methods of rehabilitating the criminal as a citizen, more especially from the point of view of removing the stigma of criminality.

R. S. T. CHORLEY.

MR. JUSTICE HOLMES AND THE CONSTITUTION. By FELIX FRANKFURTER. 139 pp. London: Oxford University Press (Agent for Harvard University Press), **8s. 6d.**

This little book has an importance out of all proportion to its size. Mr. Justice Holmes, as is well known, was the outstanding figure in the Supreme Court of the United States during the last generation; and it is possible that, with the single exception of John Marshall, he is the most important figure in the whole history of the Court. As a legal historian, he belongs to that small class of men among whom Maitland is the chief name. As a jurist, he has done more to set the boundaries of legal thinking than any name in the Common Law since Austin.

This essay on him, by one who has now succeeded to the seat on the Bench which Mr. Justice Holmes occupied, is written with an insight into Holmes's work which is unequalled by any other living writer. It has a profound interest for anyone interested in the processes of law as such. For though, formally, it is a study of the canons of interpretation which Mr. Justice Holmes brought to the problems of the American Constitution, its argument touches the far wider issue of the function of the judge in a democratic society. It gains added interest from the fact that Mr. Justice Frankfurter writes as one who eagerly accepts the great tradition of method which his predecessor bequeathed to us. His portrait of Mr. Justice Holmes at work is, as it were, an essay that may well be prophetic of the manner in which the Supreme Court will approach its problems during the next twenty years.

Mr. Justice Holmes embodied as no other man in modern times the liberal tradition in American jurisprudence. That is in itself significant, since his own private philosophy was, at bottom, profoundly aristocratic and conservative. He reached his standpoint from the realisation that there are no absolutes in law, that what we call "fundamental" doctrine is no more than a body of principles to which long use has accustomed us, that these have been adapted before, and may have to be adapted again, to new needs. He did not, therefore, conceive it part of his function as a judge to assist in making the Supreme Court a third and decisive chamber of the legislature. He took the view that as long as schemes of social change did not directly violate the plain letter of the Constitution, it was not his business to rule against them because he thought them unwise or even foolish. His test of validity was whether, granted the proper observance of the procedures laid down by the Constitution, a reasonable man could find reasonable evidence for the point of view the legislation upheld; if he could, Mr. Justice Holmes was not prepared to substitute his private view for legislative enactment. At the same time, he was emphatic that the procedures which guaranteed the classic civil freedoms to the citizen must be safeguarded from invasion or evasion by prejudice or passion, or those police methods which, like wire-tapping, for example, use dubious

techniques so gravely capable of wanton abuse. Anyone who looks at his famous opinions in *Noble State Bank* v. *Haskell* or *Abrams* v. *U.S.* will see at once the temper in which he approached his task.

Mr. Justice Frankfurter has admirably and amply illustrated that temper in the main theatres of American constitutional activity. The implications of his argument reach far beyond the American scene. They are applicable, not merely to the work of the Judicial Committee in Australian and Canadian cases; they are applicable also to much of the High Court's work in this country in the field of statutory construction. We realise too little the degree to which English judges have evolved techniques of statutory interpretation the result of which, in sober fact, is to erect barriers in the way of legislation they happen to dislike. We have far more judicial review in this country than we like to suppose, and not a little of it is the outcome of using the supposed "principles" of the Common Law as a way of defending conceptions upon the undesirability of which Parliament has made up its mind. "The Fourteenth Amendment," wrote Mr. Justice Holmes, "does not enact Mr. Herbert Spencer's *Social Statics*." But some of our judges deliver themselves of opinions which would not be easily intelligible except upon the assumption that the principles of Mr. Spencer's political philosophy are a canon to which Acts of Parliament in general, and delegated legislation in particular, must conform. They exercise a post-natal power of limiting the expressed will of Parliament in a way which does not substantially differ from that of the Supreme Court at its worst. Against that attitude, Mr. Justice Holmes's half-century on the Bench was a massive and noble protest. We are grateful to Mr. Justice Frankfurter for an exposition of his doctrine which is notable alike for its clarity and insight.

HAROLD J. LASKI.

POLLOCK'S LAW OF TORTS. Fourteenth Edition. By P. A. LANDON, M.A., M.C., *of the Inner Temple, Barrister-at-Law; Fellow and Tutor, Trinity College, Oxford; University Lecturer in Law; Lecturer to the Law Society, London.* Messrs. Stevens & Sons, Ltd. 1939. xlvi and 504 pp. **25s.**

It is an entirely pleasurable task to welcome the publication and to review the contents of this new edition of Pollock's masterpiece, and, at the same time, to congratulate Mr. Landon on the general excellence of his editorial performance and on his appointment to a Readership in the University of Oxford. What he felicitously describes as Pollock's "skill in constructing out of the huge quarry in which he mined a work which remains and will remain a model to all writers of text-books" was exhibited to a greater degree of perfection in this work than it was, for instance, in the *Law of Contract*, in which Pollock allowed his subject to take him on some pleasant but disconcertingly deviating rides. Although *The Law of Torts*, to those accustomed to the arrangements of more modern text-books, presents some strange features in its "plotte-forme" (an Elizabethan compound of merit), as, for example, in its treatment of *Rylands* v. *Fletcher* and cases of negligence under the one heading, and its brief discussion of liability for breach of statutory duty in the chapter on remedies, it is, nevertheless, a work which can confidently be recommended to the master and the apprentice alike. Mr. Landon's work on it adds to its merits of interest, lucidity, and succinctness. In fact, parts of the new edition might even be recommended to lawyers suffering from the "black-out

blues" or post-influenza depression. Its full-bloodedness cannot fail to have a tonic effect on the most jaded system.

Mr. Landon's work falls mainly into three parts: 1. The inclusion of notes and comments made by Pollock before his death; 2. The usual task of noting recent material; 3. The presentation in four excursuses and in many footnotes of Mr. Landon's own views. The latter not infrequently differ, in varying degrees, from those held by Pollock.

1. The established views of Pollock are too well known to require discussion in a review of a fourteenth edition. New matter from his pen is inserted at about thirty points, but attention need only be drawn to some of them. In view of Mr. Landon's criticism of *The Snail Case*, it was wise to reprint Pollock's note on it from *L.Q.R.*, Vol. 49. The comment on *Flint* v. *Lovell*, reprinted from the same journal (Vol. 51), showed prescience, but was not remarkably lucid or exhaustive. Pollock's summary of the effects of the "rescue cases" (see p. 129) required emendation by Mr. Landon. Recent decisions add to the value of the note on p. 201, also reproduced from the *L.Q.R.* (Vol. 46), on *Cassidy* v. *Daily Mirror*, and it is of interest to observe that Pollock was prepared to acquiesce in the view there taken by Russell, L.J., of the principle of *Hulton* v. *Jones*. Other notable points emerging from this edition are that Pollock agreed with the majority view in *Osborn* v. *Poulter* that the dictation of written words to a clerk may be slander, but not libel, that he doubted whether *Macintosh* v. *Dun* was consistent with the modern case of *Watts* v. *Longsdon*, that he apparently felt some hesitation about *Wilchick* v. *Marks*, and that he tended to agree with Professor Plucknett's views on the *in consimili casu* provisions of the Statute of Westminster.

2. Mr. Landon's declared policy in the matter of noting recent decisions was to follow Pollock's principle of selecting rather than collecting cases, but he admits to being more lavish in referring to cases decided from 1936 onwards to March, 1939.

Pollock could be curiously eclectic in his selection of material which he deemed worthy of reference in his footnotes. Mr. Landon is to be congratulated on filling some of the more obvious lacunae in previous editions and warmly commended for keeping the new material within very strict limits. But it may be permissible to suggest that parts of the text are extremely cursory in proportion to their practical importance to-day or in the near future. Breaches of statutory duty and contribution between tortfeasors are two examples which spring to mind. Some of the recent cases merely named in the footnotes might well carry some brief comments with them, particularly *Shirvell* v. *Hackwood Estates*. Occasionally, the very brevity of a note raises a doubt as to its import, as on p. 41, where the reference to the Court of Appeal and damages for loss of expectation of life may either be taken as a record of fact or as a criticism, and on p. 405 students may well be misled by note (*y*) into thinking that *Longmeid* v. *Holliday* cannot be reconciled with *The Snail Case*.

The "technical" side of the editing has been very well done. There are very occasional lapses in proof-reading, the worst being on p. 36, where *Rickards* v. *Lothian* appears as a 1931 case. There are two dark sentences in the text, the first on p. 65, where the word "latter's" seems to have slipped in instead of "owner's" (?); and the second, a real jumble at the bottom of p. 320.

3. The real interest of this edition lies in the contribution to it of Mr. Landon's own views. It is a matter of common knowledge that our

learned Hamlet can never be a merely passive spectator of the rottenness of a Denmark whose pristine state of glory and strength is being undermined in an age of decadence. He does not hesitate to indicate where the decay appears, who the decadents are, or how to arrest the baneful decline. Although he does not always carry argument to conviction on all or any of these matters, we trust that there is none to deny that his presence amongst us is, in the language of *1066 and All That*, "very definitely a good thing." If we may say so, without offence intended to Mr. Landon or to the classes herein specified, he is a very useful corrective against (i) Sob-sisters, Yammer-Heads, and/or Softies; (ii) Revolutionaries; (iii) Yankees. Of whom, more hereafter.

His four excursuses are devoted to (i) a powerful attack on the Pollock view of the general principle underlying the law of torts; (ii) a very able and partially convincing plea for the reversal of the decision in *Stanley* v. *Powell*; (iii) a very definite pronouncement in favour of the Dunedin theory of the tort of conspiracy; and (iv) an expression of distrust of *The Snail Case*, its ancestry and its progeny, actual and prospective. The third is the least meritorious, albeit the least combative. There is a great deal to be said for the Dunedin theory, but students should be made more aware of the difficulties of basing a tortious liability on a criminal liability the extent of which has been disconcertingly vague and flexible, and which, in modern times, has been much affected by legislation relating to the very class of cases in which the question of tortious liability has most frequently arisen. There is also the question of what rule to adopt in cases of mixed motives, which are likely to be the normal cases. Mr. Landon's fourth excursus is extremely interesting, but smacks a little too much of special pleading, and its strength is weakened by some uncertainty as to the exact objective of the attack. If it is to stress that Lord Atkin's wider proposition must be applied with considerable care, particularly in view of some well-established lines of cases in conflict with it, surely there is some danger of wasting energy in pushing a battering-ram at an open gate. Similarly with repetitions of the statement that the case falls within the confines of the tort of negligence. If the object of the statements that the *ratio decidendi* of the case is limited to (i) manufacturers, and (ii) products which are sold, is to limit the application of the principle to such cases, Mr. Landon is in danger of knocking his head against a brick wall. Some of the cases which he quotes and later cases constitute the wall.

[After the recent spate of articles on the subject, little purpose would be served in re-stating the arguments against the Pollock-Winfield theory of a general principle underlying the law of torts, but one *caveat* appears to be necessary, and that is that critics of Dr. Winfield should go more to the original article in the *Columbia L.R.* and less to the *Text-book*. The very considerable qualifications which Dr. Winfield specified as imposed on the freedom of judicial legislation are apt occasionally to be overlooked by *some* of his critics.]

Easily the best contribution which Mr. Landon has made to this edition is his second excursus, in which he submits the decision in *Stanley* v. *Powell* to searching criticism. He may not have done complete justice to all the authorities which might be quoted in favour of the view that inevitable accident is a defence in trespass, but he is on a solid ground of historical argument. His own contribution to the discussion, the assertion that Denman's judgment was based on a misconception of a statement

by Bramwell in *Holmes* v. *Mather*, is a good one. But when he proceeds to argue that the strict liability principle is the better one as a matter of social principle, he does not carry quite the same degree of conviction. His main argument on this head must be reserved for special comment. But it may be permissible to express the wish to meet the progeny of the plaintiff beater in *Stanley* v. *Powell*, who, according to Mr. Landon, would have lost his case anyhow on the ground of agreement to run the risk of being accidentally shot!

There is no need to say that Mr. Landon does not spare his "enemies" and his declamations are enjoyably classical. In the front rank of the hosts of Beelzebub may be placed (i) Denman, J., the evil but not the genius behind *Stanley* v. *Powell*, one of two judges who "inherited their positions on the Bench *per stirpes* and not *per capita*," "an undistinguished puisne judge," who, apparently, had one lucid interval when Esher, M.R. (*q.v. infra*) illuminated his mind in *Ellis* v. *Loftus Iron Co.*; and (ii), "academic writers who theorise" (*cx.* "common-sense" on p. 141), who delight in "law as taught in the professor's study" as contrasted with "law as administered in the courts" (p. 47). In the second rank come the authors of the heresies of "proximity" and "who is my neighbour?" Esher, M.R., and Lord Atkin. Then comes Pollock himself, who is much praised and who, to his eternal credit, (i) was not a juristic speculator, (ii) lauded "that classical period of our jurisprudence which in England came between the Common Law Procedure Act and the Judicature Act"; and (iii) always emphasised "the experience of just men of past generations, as against the fluid and ephemeral morality and sociology which, in some circles, especially in America, are nowadays set up as the sole objective of modern law". But he had strains of original sin in him, for he (i) stuck stubbornly to the general theory principle; (ii) loved too much the fault theory; (iii) showed too much *pietas* towards his errant grandfather; (iv) used the wicked device of calling what he did not like "stubborn archaisms"; and (v) had a nasty habit of not changing his darkness for light. We must also note that the Vinerian Professor has blotted his copybook by accepting *Stanley* v. *Powell*, but it is fair to note that this is a case of

> "I would not love thee, Dear, so much,
> Loved I not Tidd and Chitty more."

Then, not without honour even in "enemy territory," lurks Dr. Winfield, who somehow emerges from "the furnace made seven times hotter," wearing an air of respectability, though his *Province of the Law of Tort* does not appear in the footnotes to the chapter on "Special Relations of Contract and Tort." Then, of course, there are the revolutionaries, who do not merit inclusion in inverted commas, an honour reserved for "us 'extremists'" (*cx.* pp. 44 and 140). The footnote attached to the revolutionaries reads: "See Gutteridge, Abuse of Rights, 5 Camb. L.J., 22 *passim*." We trust that this note is sufficiently explicit to absolve the genial Professor of Comparative Law from the suspicion of having hoisted the Red Flag himself! Finally, there are our American cousins, with their "fluid and ephemeral morality and sociology," whom Thomas Beven (bless his stout heart) flogged for accepting principles "novel but fundamentally unsound" (p. 385), and who have achieved the supreme disgrace of producing "the subversive American, Street" (p. 142).

All this is grand stuff, though to some weaklings born and bred in this mealy-mouthed generation it may be too strong.

But your reviewer suffers under the misfortune of being the sole survivor of that miscreant race called "life-long Liberals." His miserably lonely existence has recently been rendered still more intolerable by witnessing the fusion of extremes in Europe, the amalgamation of "us extremists" with revolutionaries. It may be the unhinging of his mind by this calamity which causes him to suspect that that may soon be the end of Mr. Landon's pilgrim's progress. Is there not a real danger that our worthy nationalist may soon add socialism to his creed and fuse with the revolutionaries? Consider his case. His main argument for the reversal of *Stanley* v. *Powell* is: "The defendant need not have acted at all; if he chooses to act, and if his act inflicts injury directly upon his neighbour, why should the injured party go without remedy?" But, Mr. Landon, where is this revolutionary socialistic doctrine logically to stop? Witness the effect of its acceptance already upon him! To support it he quotes a most subversive assertion by Dr. Hanbury that the defendant in *Stanley* v. *Powell* ought to compensate the plaintiff as the "circumstances were such that his propinquity could have been contemplated." Mr. Landon is too good a logician to fail to observe, and too good a special pleader to ignore, the similarity between "propinquity" and the heresy of "proximity," but proclaims that the Mannerheim Line of his faith is "the solid rock of the (old) common law." But we tremble lest his belief in this medieval communism stuff will sooner or later undermine his faith. He has already sacrificed tortious lunatics and infants. He is prepared to abandon the defence of non-negligent unfortunate golfers against the injured chauffeurs of plutocrats driving past the links (p. 141). (His tinge of socialistic propaganda is disclosed by the fact that he does not make the defendant into an artisan-golfer, but plays on our sentiments by placing the chauffeur and not the plutocrat at the wheel of the car!) At this rate, it will not be long before his guns cease to harry *The Snail Case* tanks and we active ones will be the social insurers of the snails of the community. If liability for direct injury, why not indirect? If liability on the highway, why not off the highway, and then in private places? Witness further his decline into attacks on the most altruistic friends of society when, in defending *Cavalier* v. *Pope*, he tries to expose the anti-social proclivities of our landlords, who, he says, "would never undertake the obligation to repair if by so doing they rendered themselves liable to the whole world for the results of a breach of contract" (p. 411).

But Mr. Landon has but scotched, not killed, our faith in him; he still has a *locus pœnitentiae*. On p. 145, he roundly declares that "the inviolability of person and property is a precious thing in these days," and is prepared to see it protected, at any rate to the extent of keeping inviolable the property of insurance companies and/or active motorists who violate unto death the persons of too immobile pedestrians. For on p. 54 he very rightly declares that "this anomaly" (which is either the Law Reform Act, 1934, or the decision in *Rose* v. *Ford*) "should be removed by the Legislature which imposed it upon us." And he is still a comfort to us *laisser-faire* individuals who wish to preserve the right to be malicious by abstracting water from our lands and frightening our neighbour's vixen into barrenness. And we private cable companies may still wrongly transmit cables and derive comfort from the thought that, despite *The Snail Case*, *The Reuter Case* is still good law (p. 444). In short, we may

still breathe as hot and cold as our forefathers did, those "just men of *past* generations."

In these days of ephemeral sociology and morality, we are too prone to read the text "For there were great men in those days" with an intonation of surprise. We "life-long Liberals," whose cloud of witnesses hangs over the distant side of Jordan, can derive some comfort from the thought that there are still one or two alive who read the text with the right emphasis on the word "those."

Polemics apart, we express our sincere gratitude to Mr. Landon for his careful editing and his stimulating contributions.

D. R. S. Davis.

THE LEGAL ASPECT OF MONEY. By F. A Mann, LL.D., Dr. Jur. pp. xxv and 334. 1938. Oxford University Press. **21s.** net.

Money is the greatest problem in the lives of most of us, and it stands for those economic forces which mankind has not hitherto been able to control and which have brought him to the verge of moral and material ruin. As an economic institution money has always been the subject of intensive study by economists who are to this day divided in their theories over certain fundamental aspects of the problem, as the controversies, not yet died down, which followed the publication of the well-known work on the subject by Keynes a few years ago amply demonstrate. And yet lawyers have remained profoundly oblivious of the inherent difficulties of money from the point of view of their own science right down to our own generation. This book is the first on the subject of any serious moment ever to be published in English,[1] while even on the Continent there have been few studies of the subject and those all of recent date. Dr. Mann pertinently asks in his preface what is the reason for this extraordinary state of affairs. He is not concerned to answer it at any length, though no doubt he puts his finger on the crucial point when he says that it is due to the long period of stable equilibrium in economic matters which characterised the great trading and industrial states down to the beginning of the Great War, 1914–18. Within the confines of a state money gives rise to comparatively few legal problems and those for the most part not of great inherent difficulty, always of course excepting the contractual mercantile currency which exists in the form of negotiable instruments. This is because the value of money in modern times remains stable within the confines of the state. And it is just because this has of recent years not been true internationally that the inherent problems of the subject have come to light, and the courts of all countries have been faced with such extraordinarily difficult tasks as the measurement of damages in connection with the breach abroad of legal obligations, and the construction and application of what are called gold clauses. These are among the more important topics discussed by Dr. Mann in the present volume.

There can be no doubt of the great value of his contribution to legal science. Degree theses are often of very little account—this which earned the doctorate of the University of London proves that the thesis system is capable of producing real fruit. This book is comprehensive, accurate,

[1] It has now been succeeded, though certainly not supplanted, by the work of Prof. Nussbaum, *Money in the Law*, reviewed in 3 Mod. L. Rev., p. 247. The present review has been held up owing to the absence abroad of the original reviewer, and we tender our apologies to Dr. Mann for the delay.

and illuminating. With no earlier literature to guide him the author has nevertheless succeeded in opening up a discussion upon every aspect of a subject which is intermingled with many branches of the law. From what has been said above it might be supposed that these discussions must be largely theoretical. This is not so, for while it is true that until the post-war period there are comparatively few English cases, recent years have yielded a harvest which is extensive if not always of high quality. Moreover these problems are naturally not peculiar to England, and the solutions proposed for them on the Continent and in the U.S.A. may at the least furnish our own courts with suggestions. There is perhaps no aspect of mercantile law, unless it be that of international transport, where it is more important to have a fairly uniform set of rules. Moreover, until very recently there was no *damnosa hereditas* of precedent to prevent such a uniformity from being achieved. Even now the divergencies are in many respects not serious. In these circumstances Dr. Mann's intimate knowledge and copious use of the Continental and U.S. decisions is of much more than academic value. His book, should it have the good fortune to come into the hands of the legal profession both among the bar and in the judiciary, may well help to mould our law in the desired direction.

We will now endeavour to indicate the principal topics dealt with by Dr. Mann in his volume. In the earlier chapters Dr. Mann is much occupied with the fundamental economic aspects of money. He gives a lucid and searching analysis of these, the soundness of which we are hardly competent to judge. This is certainly a necessary background for the main discussions of the book and one which we found most helpful, though the average lawyer may well think it somewhat over-elaborated. Nevertheless, even this part of the book never degenerates into theoretical economics, for the author maintains contact with the legal aspects of the situation throughout.

This part is succeeded, or indeed intermingled, with an analysis of the general legal problems to which money gives rise. The organisation and incidents of the monetary system, monetary obligations, their subject-matter and extent, are discussed in this part of the book. The vital problem of the meaning of the phrase "payment of a sum of money" brings Dr. Mann to the subject of nominalism, and it is here that economic theory is particularly to the fore. It was declared as recently as 1927 by the Berlin Court of Appeal that "capitalism is economically inconceivable," except on the basis of nominalism, and it is certainly the only theory which lends itself to legal administration. Nevertheless, it works hardship at times when currencies are debased, whether by the old-fashioned methods of decreasing the value of the metallic content of coinage, or by the modern method of inflation. This gives rise to theoretical proposals for combating the trouble, and, much more important from the lawyer's point of view, to practical expedients for protecting lenders. It is at this stage that we come up against the gold clause, and here of course we are primarily concerned with problems which are international in character, though on the authority of *Feist's Case*, [1934] A.C. 61, it would not appear that there is any objection to the insertion of a gold clause in a contract of internal loan.

The second, and from the practical point of view, more valuable part of the volume is therefore concerned with foreign money obligations. Here Dr. Mann starts by clearing the ground by an analysis of the position

of foreign money and foreign money obligations in English law. He then passes to "the determination of the money of account," which is the crux of the whole problem. Here we have an able discussion of *Adelaide Electric Supply Co.* v. *Prudential Assurance Coy.*, [1934] A.C. 122, which Dr. Mann properly singles out as being the leading authority on this extraordinarily important topic. This brings us back to a further consideration of the nominalistic principle, and to the problem of judgment for damages and for debt when a municipal court is adjudicating upon an obligation incurred abroad. We are here faced with the difficult questions which arise in connection with the payment of foreign money obligations (Chapter VIII) and then with the institution of legal proceedings and its effect upon foreign money obligations.

Many of the problems which arise in this part of the book are naturally in the domain of private international law, and there can be no doubt of the great value of Dr. Mann's contribution to this branch of the law. Not since the appearance of Dr. Cheshire's textbook has there been anything of equal importance, and it may be safely said that this book will become an essential volume in the library of all students of this subject.

In a series of appendices Dr. Mann gives reports of several important decisions which for some reason have not found their way into the reports.

R. S. T. Chorley.

THE SOLICITORS' HANDBOOK OF WAR LEGISLATION. By S. M. Krusin and P. H. Thorold Rogers. lx and 836 pp. London: Sweet & Maxwell, Ltd., Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. **30s.**

The authors describe their object as being "to provide, in a single volume of moderate size, a comprehensive and practical survey of the War Legislation of 1939 so far as it concerns the legal practitioner." They have interpreted "legislation" to include statutes, regulations and rules and orders, and they have grouped it in nine parts, under nine titles, namely, the Courts and Litigation, Property, Wills and Trusts, Finance, Commerce, National Service, Social Services, Emergency Powers, and Compensation. Each part opens with a list of the legislation dealt with in that part. There follows a "preliminary note" briefly summarising the effect of that legislation and in most cases containing a general discussion of its underlying principles. Then the text of statutes is set out and annotated. Finally the relevant regulations and rules and orders are set out and occasional explanatory notes accompany them. There are two Appendices, Tables of Cases and Statutes and a good Index. The Preface contains a statement of the authors' intention to bring out supplements as further War Legislation is issued—an intention which has already been in part carried out.

Considerations of space do not allow attention to be drawn to more than two features of this work. The first is the annotations. These are very helpful so far as they go. They cite decisions on similar enactments passed during the war of 1914–18 and they bring out certain differences between the current war legislation and that of the last war. In some cases the notes are in every way adequate—full, well-considered and critical. In other cases they are inclined to be brief and very general. It is the second feature of the work that will commend itself particularly to academic lawyers, namely, the general observations contained in the "Preliminary

Notes." These notes are in some cases historical, in some instances they contain a critical analysis of the statutory provisions and a general comparison with the legislation of the last war. They can be warmly commended.

The book is excellently printed and produced and having regard to its size and the mass of material which it contains its price seems very reasonable.

D. Hughes Parry.

THE PRACTICE OF THE DIVORCE DIVISION. By E. A. Phillips. Third Edition. London: The Solicitors' Law Stationery Society, Ltd. 1939. xlviii and 622 pp. **42s. 6d.** net.

The last edition of this work was published shortly after the Matrimonial Causes Act, 1937, came into operation, but so many points in that statute have been elucidated since then by the Courts that a new edition, embodying the results of these recent cases, was necessary. It is most unusual to have within the covers of a single book all the law and practice on a subject, but Mr. Phillips has managed to do that for divorce. Perhaps the best indication of the completeness of his book is the fact that over one-third of it is made up of appendices which give the full text of the various statutes dealing with matrimonial affairs, the Matrimonial Causes Rules, the relevant Rules of the Supreme Court, and finally a most exhaustive list of precedents, some 155 in number. A copious index enhances the usefulness of the work. Like most members of the profession, the learned author preferred the decision of the Divisional Court in *Stafford* v. *Kidd*, [1937] 1 K.B. 395 to that of Luxmoore, J., in *Re Bromage*, [1935] Ch. 605, and presumably shares the hope that the House of Lords will reverse the Court of Appeal which has overruled the former decision in *Ettenfield* v. *Ettenfield*, [1940] 1 All E.R. 293. This book is very accurate and will receive a warm welcome from lawyers who handle divorce work.

D. W. Logan.

LIABILITY FOR ANIMALS. An Account of the Development and Present Law of Tortious Liability for Animals, Distress Damage Feasant and the Duty to Fence in Great Britain, Northern Ireland and the Common-law Dominions. By Glanville L. Williams, LL.B., M.A., Ph.D. lxvi + 409 pp. Cambridge University Press. **25s.**

This is a work of immense importance. It is an amazing but undeniable fact that there has never been in this country a comprehensive treatise on the law relating to animals. The topic has of course always interested inquiring minds and has had its proper niche in works on Torts and Distress, but that was hardly good enough. The depopulation of the countryside and the invention of much more devastating implements of destruction may perhaps to some extent have been responsible, but whatever the reason the topic lay curiously neglected. Even the fact that the one branch which continued to show signs of fairly vigorous life, the scienter action by its very name conjured up memories of the days when pleadings were couched in Latin was not apparently sufficient to incite some historically minded enthusiast to delve into the original whys and wherefores.

Perhaps, on the whole this is as well. Of all topics the law relating to animals can only be treated adequately upon a solid foundation of historical research and it may be doubted whether, until comparatively recent

times, historical knowledge of the early phases of English law was sufficient to produce anything better than brilliant conjecture. If any work had been done, it would all, in the light of recent historical discoveries, have had to be done again. Now at last Dr. Glanville Williams has undertaken the task and no one could have carried it out more competently.

Of Dr. Williams's scholarship it would really be an impertinence for me to speak. The width of its range can be judged from the ample references he gives, not only to the Year Books and other early sources so far as England is concerned, but also to medieval Welsh, Irish, Scottish, Scandinavian and German principles. Even the code of Hammurabi, the Law of Moses and the legal systems of the Persians and Hindus, and of course the Greeks and Romans, find their place. For more modern ideas cases are cited from the reports in England, Scotland, Ireland, Canada, Australia, New Zealand, South Africa, Ceylon, India, Newfoundland and the United States, not to mention Burma, the Federated Malay States and the Falkland Islands. Nor is this a mere parade of unassimilated learning; his references are all pertinent and serve to illustrate once again the apparent universality of many of the more important primitive ideas.

The work consists of six parts. The first is devoted to that abstruse tangle known as distress damage feasant. The person who learns his law from nutshells must often have wondered whether there was any rhyme or reason in any of the rules, still more the innumerable exceptions, which any codification of the existing position produces. A person who has read his Williams will see, not perhaps that there is always a reason in the logical sense for a rule, but that it is the outcome of a consistent and intelligible development from the early conception which fixed the blame for damage, not on any individual by reason of being the owner of a chattel, but upon the offending chattel itself. Somewhat akin to this conception was the principle by which a gage might be taken from any individual who was found committing a wrong. Out of these two streams a current of self-help was formed which was too strong to be left quite unrestrained and accordingly a cross current set in when the Courts set out to discourage self-help in order to promote resort to litigious remedies. The whole story makes fascinating reading and every page brings new illumination on something that was formerly dark and dreary.

The second part of the work deals with the action of cattle trespass. Here the development was along the lines from thing-liability to personal liability. As was inevitable, the main difficulty was to find an appropriate form of action and this was not finally fixed until about 1353. The duty to fence follows appropriately in the third part and the discussion about prescription and agreement makes one realise how modern the whole subject really is. Nuisance is next considered, followed by the scienter action which takes one back again to conceptions based in origin upon a liability resting not upon a person, but upon a thing. The sixth part is devoted to Animals and the Highway with particular reference to cattle trespass, nuisance and high fence.

In all aspects it is the historical method which Dr. Williams follows, and there can be no doubt that one of the great merits of the book is the way in which it explains something to all appearances quite anomalous by reference to its historical development. It must not, however, be thought that the book is limited to matters of history. Dr. Williams explains and discusses shrewdly and judiciously all the cases which stand as bastions of the accepted rules, and some of them do not really withstand the

criticisms which he makes. He also ventures on the dangerous path of suggesting what the law ought to be. It would be idle to pretend that in attacking what is standing or in planning for the future he will command universal acceptance of his views. There is surely no more reason why a person who wishes to keep a cat should be responsible if it kills a pigeon, than there is why a person who wishes to keep pigeons should take steps to prevent cats getting at them. People should be encouraged to keep animals which are useful as beasts of burden or as companions, and, in so far as they have propensities which are normal and therefore well known, it should be up to others to act appropriately in self-protection. Dr. Williams is, of course, on topics such as these, entitled to his views and more entitled than most people to express them, but others will, it is to be hoped, be found who prefer to favour their own ideas.

I cannot close this notice without an apology to Dr. Williams. His work merits a much deeper and more detailed examination than is herein contained, and called for such an examination a good deal earlier than the present time. I can only plead that circumstances over which Hitler alone had control have unfortunately made this impossible. I can, however, say that at any rate one practitioner has, by reading this book, acquired a knowledge of the present-day principles which he never had before and looks forward to using his Williams as an abiding source of reference and enlightenment in quieter days to come.

STEPHEN CHAPMAN

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